PRINCIPLES

OF

CONVEYANCING;

DESIGNED FOR

THE USE OF STUDENTS:

WITH AN

INTRODUCTION

ON THE

STUDY OF THAT BRANCH OF LAW.

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THE SIXTH EDITION, WITH CONSIDERABLE ADDITIONS:

PART I.

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ADVERTISEMENT.

THIS *First* Part of the Sixth Edition of the PRINCIPLES of CONVEYANCING has the addition of References to several recent cases. The Professional engagements of Messrs. MORLEY and COOTE having prevented their completing the *Second* Part, it is edited by THOMAS COVENTRY, of Lincoln's Inn, Esq. Barrister at Law.

A

TABLE

OF

CONTENTS.

BOOK II.

OF CONVEYANCES, AS THEY RELATE TO ESTATES.

BOOK III.

OF CONVEYANCES WITH RESPECT TO PARTIES.

INTRODUCTION

BY

MR. WATKINS.

All the Notes to this Introduction are by MR. WATKINS.

AMONG the many discouragements which attend the study of the law, there is none more obvious, or more generally complained of, than the want of method and direction.

To take a young person from an university or a school, where his mind has been occupied with other pursuits, and to toss him headlong into the practice of the law, wholly unprepared, or with little preparation, for so arduous a study, is in itself so absurd, that we can only wonder at its occurrence.

What must be the embarrassment of such a person amid business of such nicety as to call forth the full exertion of the veteran in practice?—It is folly to expect from the human mind what a moment's reflection would tell us it would be impossible for the human mind to perform. Conveyancing is not intuitive any more than the mathematics. The mind cannot draw conclusions without having been previously furnished with premises. And however the individual may be prepossessed in favour of a peculiar mode of study, there are, and, while the human mind continues what it is, there must be, general rules which ought to be attended to in the acquiring of knowledge.

We must be sensible that we can act with greater energy in proportion as our attention is confined. That attention becomes weakened as it becomes divided. We must analyze in order to comprehend with accuracy. We must understand the cause before we can embrace its consequences. It should seem to follow, therefore, that in law, as in other sciences, we should begin with the first principles, and form

a general outline before we descend to the *minutiæ*.

A general outline the mind can easily embrace, and the general principles of law it can easily remember. When acquainted with a whole, we may discern the symmetry of the parts: but an insulated position will appear arbitrary, and its connection will not be seen. As difficulties arise, or new matter presents itself, a general principle will afford us a rallying point; and we shall find ourselves possessed of premises from which we may argue.

To a general outline, and to general principles, then, should the student be at first confined. To rush into miscellaneous and unconnected reading is to embarrass and distract the intellect; is to weary the powers of the mind with unnecessary, and with useless exertion. It is to contradict the suggestions of common sense and experience, and to violate the rules which nature herself has imposed.

But, in direct defiance of principles so obvi-

ous, how often do we see *Coke upon Littleton*, or a volume of Reports put into the hands of a young person on his entering upon the profession! From the miscellaneous nature of such writings, an idea is often effaced as soon as it is formed. The mind is hurried from subject to subject, without being suffered to dwell sufficiently upon any. Points of the greatest nicety, and learning the most abstruse, are suddenly presented to the view of a novice, which would perhaps puzzle the most experienced lawyer. Deductions and conclusions are given when the principles from whence they flowed remain unexplained, and even unknown, to the student. The observations on *Littleton* by Lord *Coke*, are wholly without method. Such a chaos of incoherent observation is by no means calculated for a regular perusal. Our attention is frequently called from an anxious consideration of a legal principle to a dissertation on the, &c. of Littleton, to an account of Sir William Hearle, or to a quotation from Virgil or Horace. Indeed, the want of method in most of this writer's works, makes them more proper for occasional consultation than the perusal of the student. His strange quaintness

and eccentricities may make one smile: but they divert the attention, and withdraw it from the subject to which we wish it confined.

That the *Commentary upon Littleton* contains a valuable fund of Common Law learning is certain: but the observations are thrown together without order. Great as Lord *Coke* may be, the prejudice in his favour may, perhaps, be extravagant. His industry was astonishing: but he seems to have possessed little of the spirit of law: and whatever might have been his legal learning, the frequent illiberality of his sentiments cannot be sufficiently reprobated;* and the student ought to be cautioned against it.

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* The manner in which he treated Sir Walter Raleigh may be seen in the State Trials; and will be an object of execration while his name shall continue.

In Calvin's case (7 *Rep.* 17 a.) he says, "All infidels (among whom he reckoned the *Jews,* 2 *Inst.* 507.) are in law *perpetui inimici,* perpetual enemies, for the law presumes not that they will be converted, that being *remota potentia* (a remote possibility) for between them, as with *the devils, whose subjects they be,* and the Christian, there

A Volume of Reports must, from its very nature, be full of unconnected matter; and, consequently, be improper for early reading. The report of particular cases may, indeed, be read by the student with advantage: but they should be cautiously pointed out for his perusal, and carefully explained.

The number of reporters and the manner in which many cases are reported are most serious evils; are evils which cannot be too much lamented, nor sufficiently exposed. The

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IS PERPETUAL HOSTILITY, AND CAN BE NO PEACE. The illiberality of Lord *Coke* with respect to the Jews has been deservedly condemned and held up to detestation in the case of Omychund *v.* Barker, which is reported in a very superior manner by *Atkins* (Vol. I. p. 11.) and which cannot be too strongly recommended to the Reader's perusal. The argument of the Solicitor-General, Mr. Murray, (afterwards Lord Mansfield,) is a masterpiece of its kind; and those of the Lord Chancellor (Hardwicke) and the three Chiefs who assisted him, (Lee and Willes, C. J. J. and Parker, C. B.) were worthy of Christians, as the sentiments of Lord Coke were disgraceful to him as a man, and much more so as a professor of the Gospel.

contradictory statements of the same case, the confounding the arguments, nay, assertions of the counsel, with the decisions of the court, the *obiter* and extra-judicial sayings of the Judges, with the grounds of the judgment, the observations of the reporter with the points of the case, call aloud for the nicest and severest discrimination.

I believe it will be found on examination, that an implicit submission to the assertions of our predecessors, whatever stations those predecessors might have filled, has been one of the most certain sources of error. Perhaps there is nothing which has so shackled the human intellect, nothing which has so retarded the progress of truth, nothing which has so greatly promoted whatever is tyrannic, preposterous, or absurd, nothing which has so much degraded the species in the scale of being, as the implicit submission to individual *dicta*. The blunders of one age (and blunders have occurred in all ages) cannot warrant the blunders of another. What was once expedient may now, by reason of a change of circumstances, be improper. To ap-

peal to matters of fact, with respect to matters of right is, in itself, preposterous and absurd. If we must be bound by former decisions, let those decisions be given by the most unequivocal authority. Let the statement of facts, the decision of the court, and the grounds and reasons of that decision, be drawn up by a proper officer, and signed by the Judges who preside. Let not the crude notes of the dead be brought forward to mislead the living. Let not the reputation of those who have left us, and who are no longer able to defend themselves, become the prey of the sweepers of their closets. We should consider that many who took notes in court did not take them with a view to publication: but that those notes were frequently ushered into public merely from the rapacity or avarice of those who survived. Compare *Rolle's* Reports with his Abridgment. Look at the undetermined cases in *Dyer*. Consider how soon a quoted case becomes what is called authority, and consider how soon authority shoulders out common sense. It would not be difficult to point out many instances in which the adherence to the reports of adjudged cases has overthrown the acknowledged principles of the

law of the land, and, in effect, repealed the solemn acts of the legislative body.* If the acts of the legislative body become incompatible with the manners of the times, let us apply to the legislative body for their alteration or repeal, but let not the Judges become superior to the legislative body.

"*Ita lex scripta est*," is the cry of many a man who would be angry with another that expressed a doubt whether he possessed

* The famous *Habeas Corpus* case, in 1627, was determined on the authority of precedents, directly in the teeth of *Magna Charta*, and six other statutes. "Precedents were read," says *Selden*; "Acts of Parliament were passed over." (*Seld. Works*, Vol. VI. p. 1956—8.) The substance of Sir Nicholas Hyde's curious apology for this violation of the laws of his country may be seen in 1 *Rushw. Coll.* 461.

In the celebrated Bewdley case, (which has been frequently recognized *as law!*) the practice of the Court for seven years was held superior to an Act of Parliament! 1 *P. Wms.* 223. 2 *Str.* 755. 3 *Burr.* 1755.

See, as to the statute of Uses, 1 *Atk.* 591. in Hopkins *v.* Hopkins, 2 *Bla. Comm* 335—6. *Dougl.* 774, &c.

ratiocination. About the time of passing the statute of uses, some wise man, in the plenitude of legal learning, declared that there could not be an use upon an use. This very wise declaration, which must have surprised every one who was not sufficiently learned to have lost his common sense, was adopted, and is still adopted; and upon it (at least chiefly) has been built the present system of uses and trusts. Another, adopting just so much of an argument as answered his purpose, and rejecting a conclusion which followed from the self-same premises, decreed that there should be no dower of a trust; and Chancellor after Chancellor submitted to this strange assertion, and followed it in defiance of every thing rational. "We are bound by precedent," say they; but are we not bound by principle also? Can precedent release us from a moral obligation?

If reports of adjudged cases be frequently found such as I have noticed, it surely will be sufficient to advert to them, in order to guard the student from relying upon them where the reason of the decision is not apparent.

WHEN WE ARGUE FROM ADJUDGED CASES, WE ARGUE FROM CONCLUSIONS ALREADY DRAWN, AND NOT FROM PREMISES BY WHICH THOSE CONCLUSIONS MUST BE WARRANTED. THE MORE WE ARE REMOVED FROM THOSE PREMISES, THE GREATER THE PROBABILITY OF ERROR IN OUR CONCLUSIONS MUST NECESSARILY BE.

But supposing that a person should be so fortunate as to be able to extract something comprehensible out of *printed* contradiction, yet other contradictions may make their appearance in *manuscript*; and, overthrowing all his hard-earned knowledge, remind him once again of the *glorious uncertainty of the law*. Is the law of England to depend upon the private note of an individual, and to which an individual can only have access? Is a Judge to say,—"Lo! I have the law of England on this point in my pocket. Here is a note of the case which contains an exact statement of the whole facts, and the decision of my Lord *A.*, or my Lord *B.* upon them. He was a great, a very great man. I am bound by his decision. All you have been

reading was erroneous. The printed books are inaccurate. I cannot go into principle. The point is settled by this case." — Under such circumstances, who is to know when he is right, or when he is wrong? If conclusions from unquestionable principles are to be overthrown in the last stage of a suit by private *memoranda*, who can hope to become acquainted with the laws of England? And who, that retains any portion of rationality, would waste his time and his talents in so fruitless an attempt? Is a paper evidencing the law of England to be buttoned up in the side-pocket of a Judge, or to serve for a mouse to sit upon in the dusty corner of a private library? If the law of England is to be deduced from adjudged cases, let the reports of those adjudged cases be certain, known, and authenticated. What an idea must a foreigner form of our laws when he conceives them either founded upon or subject to be contradicted by, nobody knows what?

I acknowledge the utility of publishing the solemn decisions of the Courts; but I say again, let the reports of those decisions be faithfully

given, and stamped with authority; and let the grounds of such decisions be rational and apparent.* Let not the laws of England be picked out, like diamonds from a dunghill, from among such crude and incoherent, such unintelligible and contradictory matter,† as now loads our

* It is but little consolation to say, on the trial of a cause, "That case is not law," after it has misled half the kingdom.

† "It seems to me," said Lord Commissioner *Eyre* that those two cases, [Acherley *v.* Vernon, and the Attorney-General *v.* Downing,] are in *direct opposition to each other*:—but it seems [also] to me, upon the best consideration, that the former case is so determined, and is of such authority that every thing must yield to it," 1 *Ves. Jun.* 495. Barnes *v.* Crowe.

It would require some ingenuity to reconcile the cases of Burnaby *v.* Griffin, (3 *Ves. Jun.* 266.) and Mores *v.* Huish, (5 *ibid.* 692.) though determined by the *same* Chancellor. In the former it was ruled that a feme covert, who was entitled to rents and profits during her life *for her separate use*, might make an equitable tenant to the *præcipe;* but in the latter it was held, that though the feme covert was so entitled, and even though the rents and profits were expressly given to the intent and purpose that they might "be solely

shelves. Let us seriously consider the evils which must arise from suffering absurdity* to be

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at her own disposal," she could not charge them. Which of these cases then is law? If the latter, the recovery which was supported in the former must be good for nothing; and if the former be law, the latter cannot well be so. The feme covert *must have had* power to transfer or charge her interest, or *not* had power to do so.—To say that she *had* such power, and that she had *not*, would be a contradiction in terms; and it should seem, therefore, that these cases are also contradictory.

* "The absurdity of Lord Lincoln's case is shocking." "However, it is now law," said Lord *Mansfield*, in the case of Doe *v.* Pott. *Dougl.* 722.

A power was given to a person to appoint by writing under *seal;* and she made a will or codicil, on *stamped* paper; and according to the report of the case of Sprange *v.* Barnard, (2 *Brown's C. C.* 585.) it was held, at the Rolls, to have been a good execution of the power:—"*The stamp being equivalent to a seal.*" But, surely, if the stamp can be considered as a seal, it must be that of the Commissioners for managing the stamp duties, or at least of Government, and not of the person writing on the paper stamped. If I sign a receipt for fifty shillings upon a stamped paper, will the receipt be *an instrument under seal?*

consecrated by use; and, when established as a precedent to interfere with, and perhaps to render nugatory, the undoubted principles of our laws.

If the laws of England are to depend upon the decision of a Judge, we should remember that the decision of a Judge may overthrow them.

However well acquainted a person may be with adjudged cases, he will soon find cases occur in practice with which those already decided will not altogether accord. In such circumstances he can only have recourse to principle. The necessity of an acquaintance with principle, therefore, is too apparent to be further insisted on.

Another class of writings which the student should avoid, or, at least, read with extreme caution, is that of detached arguments on cases which have been adjuged. Arguments thus published, when presented under the sanction of general reputation, and crowded with a profusion of legal reference, are too often calculated to

mislead. The student must not be satisfied with assertion, or carried away by the name of an author. If he cannot confront argument with argument, and receive the necessary *data* on *both* sides of the question, he should suspend his judgment; he must not decide upon *ex parte* evidence. Besides, such arguments are, for the most part, on points of much nicety, and which seldom arise; and he should defer the consideration of such till he has made himself master of principles more general, and of propositions more obvious and evident.

When success has attended a peculiar mode of study, it may be reasonable to suppose it to be just, and warrantable to recommend it to others. I would, therefore, advise the student to begin with a general outline: he may fill it up at his leisure, as he may find himself prepared for the undertaking: to confine himself at first strictly to principles; and, when he meets with technical terms, to be content with a mere explanation, and not pursue the subject of that term any further, as it will only withdraw his attention from that which he meant to

pursue. It is the great fault of our Law Dictionaries, generally, that they partake too much of the nature of Abridgments. But a dictionary and an abridgment are very different things, and ought to be kept apart. It is much to be wished that a Law Dictionary might be given which would comprehend merely the terms of art, and those obsolete words which occur in old legal or historical writers.

His general books may be *Finche's Law; Blackstone's Commentaries; Wynne's Eunomus; Hale's Common Law; Reeve's History*; *Sullivan's Lectures; Dalrymple on Feudal Property; Littleton* (without the Commentary); the Freehold part of *Gilbert's Tenures;* Select Notes to the late Editions of *Co. Litt.; Touchstone;* and *Fonblanque on Equity*, with *Francis's Maxims.*

Having gained a general view of the Law, and being taught to divide his subject, he may pursue it as far as his inclination may lead him. He may go up to *Puffendorf* or *Grotius*, or down to a volume of reports, or the fleeting publications of the day.

I recommend the Commentaries of *Blackstone*

as a general book. The intention of that ingenious writer was to give a comprehensive outline; and when we consider the multiplicity of doctrine which he embraced, the civil, the criminal, the theoretical and practical branches of the Law, we must confess the hand of a master. But in the *minutiæ* he is frequently, very frequently, inaccurate. He should, therefore, be read with caution. The student in reading him will often require explanation from him whose duty it is to instruct.

Noy's Maxims, in all the editions, are too incorrect to be entrusted in the student's hands. *Perkins* has too many *queries*; though *Perkins* may be gone through with advantage, if accompanied with oral explanation.

The following pages have been also found to yield assistance to the student; and they are presented to the world in the hope that they may be more extensively serviceable than they could have been if confined to manuscript. The mode of reading them was this;—The student, (after being acquainted with some general books as before recommended,) read the work entirely

through that he might form a view of the whole. He then began again, and read chapter by chapter; consulting the books, or portions of books, referred to, *but confining himself strictly to the subject of the chapter immediately before him;* and the whole was accompanied with oral explanation, whenever he felt himself at a loss. He paused between the chapters when the connection was not immediate, that there might be no concussion of ideas, or that an idea formed on one subject might as little as possible be effaced by an idea on another.

The study of the laws of a country, and especially the laws which have been accumulating for many, many centuries, must necessarily be attended with labour. But we should not intimidate the student at the threshold with unnecessary embarrassment. Much labour may be prevented by method, and much disgust by a favourable impression.

To prove that the profession of the law is an honourable profession, we must shew it to be enlarged in its principles, and liberal in its

practice. To have gentlemen and men of genius in the profession, we must show the profession to be such as a gentleman and a man of genius may pursue.

Law should be considered as a moral science, as the rule of rational and accountable beings. The profession of the law was instituted merely for the furtherance of justice and the preservation of right;—shall we pervert it, then, to the suppression of what it was ordained to support? Shall we represent it as incompatible with any thing that is liberal, or manly, or useful? If the profession can only be pursued by abandoning the rigid dictates of moral rectitude, the nicer feelings of humanity, or the exertion of the nobler powers of the mind, it is a profession which it would be criminal in man to pursue. The conduct of some of its professors has, indeed, subjected it to much contempt; and from those who must regard it with contempt, it is folly to expect admiration: and the conduct of many who profess themselves its friends, tends but little to remove the odium it has shared.

It is ridiculous to hear a person, who boasts that his profession is *an honorary* profession, talking incessantly of his fees. It is ridiculous to hear a person who, in a court of justice, wilfully embarrasses a witness for the sake of gaining his cause, right or wrong, call his profession an *honourable one.* It is ridiculous to hear a person talking of *the honour* of his profession, who receives a sum of money for discovering a loop-hole in a title merely to enable his employer to creep through, that he might rescind a contract which he had entered into with his eyes open, and which every principle of moral rectitude will oblige him to perform.

We may talk as much as we please about the honour of a profession of which a conduct like this forms a part; but, while a conduct like this forms a part of a profession, no man of common honesty or of common sense can cease to regard it with contempt.

But by shewing that a conduct like this is only the perversion of individuals,—that the profession so far from requiring it, is disgraced

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by a conduct like this,—that it affords a field for the exertion of the most transcendant abilities, and the most benevolent inclinations,—that it is compatible with whatever elevates or adorns the character of man,—can we only hope that the profession will own the Good and the Great. —It is by such means only that it can retain its wonted place in the scale of science, and be rendered worthy of the human mind.

If the day be not yet come, the day is very fast approaching, when knowledge shall be justly appreciated; when systematic pedantry shall no more acquire the reputation of learning; when those literary pursuits, which incumber the memory without calling forth the exertion of intellect, or amending the heart, shall be deservedly reprobated; when prejudice shall melt away before the genial beams of investigation and truth; and when learning shall only be esteemed as it becomes subservient to the *virtue*, and, OF CONSEQUENCE, to the *happiness* of mankind.



PRINCIPLES

OF

CONVEYANCING, &c.

BOOK I.

OF ESTATES AND INTERESTS, AS THEY RELATE TO CONVEYANCES

CHAP. I.

OF AN ESTATE AT WILL.

AN Estate at Will [is the lowest estate which can arise by the agreement of the parties; it] is not bounded by definite limits with respect to time; but as it originated in mutual agreement, so it depends upon the concurrence of both parties. As it depends upon the will of both, [which it does by implication of law, even where it is expressed to be at the will of one only, *Co. Litt.* 55. a.] the dissent of either may

2 Blackst. Com. ch. 9. p. 145, to p. 149. *Litt.* b. 1. ch. 8. and the Comment. *4 Comyns's Dig.* 58, *Tit. Est.* H. 10 *Vin. Ab.* 396 to 420. 1 *Rolle's Abridg.* 858. 1 *Cruise's Dig.* 2d ed. 279.

determine it.* Such an estate or interest cannot, consequently, be the subject of conveyance, [and it must determine by the death of the lessee, without conferring any title on his personal representative to hold the land.] Could the *lessee*, (for he is not a *termor*, as a termor is
1 T. R 382. ad calc co-relative with a *term* or *definite* event), convey the premises to another, he would determine *his own will* to hold. He himself would be no longer a tenant; for he cannot be a tenant and not a tenant at the same time: and by the transfer he would part with his *own interest*. As the tenancy *is at will*, it must, [as beforementioned,] of consequence, be at the will of the lessor as well as of the lessee. Now, if the transferree, [or the representative of the lessee,] could become a tenant, it would be independently of the will of the lessor, and consequently he would not be a tenant at *his* will, and consequently the estate would not be a tenancy at will at all, as the will must, in such cases, be *reciprocal*. Should the lessee introduce a stranger into the tenancy *with* the assent of the lessor, it would not be a transfer of the *lessee's* interest or estate, for *his* interest or estate would be, by the very act, *determined*; but a *new* estate at will would be created, since the original lessee would relinquish

* And any conveyance by the lessor of the property held at will, is evidence of his dissent, and operates as a determination of the will. Disdale *v.* Iles, 2 *Lev.* 88.

or adbicate *his* interest or estate, and the stranger would take an estate, by the immediate act of the lessor, which had never been in the original lessee.

But as it is reasonable that a person should reap what he has sown, and as the greatest part, if not the whole, of the year, is requisite for the purposes of agriculture in its present state, the law does not favour [the raising by construction alone of] an estate at will; and, if the rent be reserved yearly or half-yearly, it frequently takes the circumstance as evidence of a *term; i. e.* of a lease for a year, or from year to year.* Yet, as such a presumption is merely

Bull. Nis Pri. 84. 2 Sir *W. Blackst. Rep.* 1173. 2 *Bl. Com.* 147. *Walk. N.* IV. *to Gilb. Ten.* 359.

* With regard to the purposes of agriculture, the tenancy from year to year does not, in all cases, appear so favourable to the tenant as an estate at will. The doctrine of emblements attached by the Common Law to the latter estate, and to all other particular estates of uncertain duration, *Co. Litt.* 55. b. protects, in a great measure, the interests of a lessee at will, so far as relates to the purposes of husbandry; and the determination of the estate, either by the act of God, or of the lessor, does not deprive the lessee, or his personal representatives, of the benefit of the growing crop; for the lessee is entitled to the crop where he sows the land, and his estate is afterwards determined by the lessor, *Litt.* s. 68. And his personal representatives are entitled to it, where the estate is determined by the death of the lessee, *Co. Litt.* 55. b. And from the same principle, it should seem that the lessee would be entitled to the crop where the estate is determined by the death of the lessor. On the other hand, if the lessee forfeits, or himself

for the furtherance of justice, if such construction would, on the contrary, be productive of wrong, such construction cannot take place; according to the maxim that a construction of law, as such, shall do injury to none. As for instance, if a lease from year to year would work a *forfeiture*,* there can be no reason for construing such a demise a lease for a year rather than an

determines his estate, he is not entitled to emblements, *Co. Litt.* ib. as in the first case, his loss arises from his own wrong, and in the latter, it is his folly to determine his estate before the crop is removed. Now a tenant from year to year has not the same advantage, if his tenancy expires before the harvest, as he must quit at the expiration of the regular notice without any reference to the state of the crop. With respect to the rent, as affected by the determination of an estate at will, the principle is, that the act of the lessee shall not prejudice the right of the lessor; the lessee, therefore, cannot determine his estate at any time before the rent is payable, without paying rent up to the next day it would become due; but if the lessor determine the estate before the rent is due, he shall lose the rent. Leighton *v.* Theed, 2 *Salk.* 413 and Title *v.* Grevett, 2 *Ld. Raymond*, 1008. And probably the lessor, or his representatives, would be held entitled to rent, in all cases where the lessee, or his personal representatives actually receive the emblements, except in the case where the right to receive them arose from the determination of the estate by the act of the lessor.

* It is clear from the modern case of Fenny *v.* Child, 2 *Mau. & Sel.* 255. that the courts of law will not raise a constructive tenancy where it shall work a forfeiture; and, therefore, a lease from year to year would not be raised by implication alone, where it would have that operation.

estate at will. And much less can we be warranted in construing that to be a lease *from year to year* which a positive Act of Parliament has declared to be an estate at *will*.

But, though it is enacted by the Statute of Frauds, (29 Cha. II. c. 3. s. 1.) that a lease *by parol*, for a longer term than three years, shall have the force and effect of an estate at will only, it is proper to inform the student that there are cases in which a lease *by parol* for a *longer* term than three years has been deemed to create a tenancy *from year to year*, (5 *T. R.* 471. Doe *d.* Rigge *v.* Bell. 8 *Ibid.* 3. Clayton *v.* Blakey,) and, consequently, as not having "the force and effect of an estate *at will only*."

In Clayton *v.* Blakey,* Lord Kenyon is made to say:—"The meaning of the statute was, that "such an agreement should *not* operate *as a term*. "But what was then considered as a tenancy at "will has since been properly construed to enure "*as a tenancy from year to year*." Now, what is a tenancy *from year to year* b[illegible] *term*? In See the next Chapter.

* The reporters of this case seem to have entered completely into the spirit of it; for it is said, in the margin of the report, "*Though* by the Statute of Frauds *it is enacted*, that all leases by parol, for more than three years, shall have the effect of estates at will only, *such a lease enures as a tenancy from year to year*."—Note by Mr. Watkins.

Doe *d.* Rigge *v.* Bell, his Lordship expressly held that the landlord could not determine the tenancy *till the end of the year.* But, if the tenancy was not determinable *till a definite period*, it is humbly apprehended that *a term did exist*, contrary to the statute in that case made and provided, whatever may be decided to the contrary of that statute in any wise notwithstanding. For it would be confounding of ideas, it would be an abuse of language, it would be an insult to common sense, to affirm that an estate *of a definite duration* was *not* a *term;* or that an estate *at will* was *independent on volition;* and the statute expressly declares that the estate in question *shall* be an estate *at will.*

Now, as the statute expressly declares that such a demise shall "have the force and effect of a lease or estate *at will* ONLY, and shall not, either in law or equity, *be deemed or taken to have* ANY OTHER, *or* GREATER *force or effect*, any consideration for making such parol lease or estate, or any former," (the statute could not, from the very nature of the thing, provide against any future) "law or usage to the contrary, notwithstanding;" to assert, in an unqualified manner, that that estate which the statute positively declared shall *be an estate* AT WILL ONLY, *and shall* NOT EITHER IN LAW OR EQUITY, BE DEEMED OR TAKEN TO HAVE ANY OTHER OR

GREATER EFFECT, shall NOT be an estate *at will only*, but SHALL *be deemed and taken to have* ANOTHER *and* GREATER EFFECT, is, certainly, very bold, if not, as certainly, very wrong.

The truth, therefore, seems to be that, where a person leases lands to another by *parol*, without expressing the time for which the lessee is to hold, the law will avail itself of the circumstances which the demise presents, in order to construe such a lease, as creating a tenancy for a year, or from year to year, rather than a tenancy at will; but where a person leases lands to another by parol for a longer space of time than three years from the making of such lease, the statute interferes by declaring it an estate *at will*, and precludes us from saying that it is *not* an estate at will, but *a tenancy for a year; because* SUCH *a tenancy would* NOT *be an estate* AT WILL.

The courts may, certainly, give a reasonable construction to the agreement of individuals; but the courts have not, nor can they have, without making the executive superior to the legislative power, any authority to repeal or contradict a positive Act of Parliament. If an Act of Parliament be absurd or impolitic, or inconsistent with the manners of the times, let it be repealed or altered by the powers by which it was enacted; but, till it be so repealed or altered,

it should be obeyed, if not contrary to the laws of God.*

* These observations of Mr. Watkins on the limits within which the courts of law should confine their decisions, proceed from that jealousy which every person, who wishes to preserve the constitution of this country, must feel when he sees any branch of it assuming powers that encroach on the functions allotted to another. For it is useless to confine the powers of making laws to a legislative body, if the courts who are to carry them into execution assume a jurisdiction which renders those laws nugatory. But, at the same time, we must not forget, that a great part of the law of England has arisen from the decisions of our courts; and to the principles which have influenced the courts in their decisions, and which have afterwards derived authority from those decisions, we have been indebted for many valuable improvements. The condition of villeinage was, in fact, abolished by the steady opposition of the courts of law, and their taking advantage of every circumstance which ingenuity could suggest to favour the manumission of the persons subject to that degrading servitude. From the same source probably the tenure of copyhold arose in the place of one depending on the mere will of the lord. The free circulation of landed property, by admitting a power of barring entails, was derived from the same quarter. In these instances, not to mention others, the courts by a series of decisions founded on an enlightened policy, gradually encroached on the established order of things, and ultimately effected a great and beneficial alteration in the state of society and property; and these changes probably would not have been made so early had they been attempted by an application to the legislature. The burthens of the feudal system were also virtually got rid of before they were removed by the legislative authority; for, by the invention of uses, and afterwards by the introduction of trusts, the

But a lessee at will, though he cannot transfer his own interest, is capable of accepting a re- Litt. sect. 460. Co. Litt. 270. b.

rigour of that system was so far alleviated that it existed scarcely otherwise than in name when it was eventually abolished. The history of our jurisprudence shews, therefore, that our courts have always exercised a power which cannot be strictly reconciled with their authority, considering them as merely entrusted with the execution of the laws; and in the exercise of this power, experience has shewn, in most cases, that the courts have felt the influence of the progress of liberal principles earlier than the legislature, particularly where the application of those principles concerned only the mutual rights of individuals. In the present state of society, the exertion of this power ought certainly to be narrowly watched, and perhaps ought never to be admitted in any question of constitutional law. For, with whatever safe-guards the judicial authority may be environed, to prevent the influence of government from swaying its determinations, and it is difficult in this view to form any system more perfect than is established in this country: yet, there appears to be generally a bias in the judicial towards the governing power; and probably, on examination, many of the changes which have been effected by the exertions of the courts of judicature, may be traced to such a bias; particularly in the destruction of villeinage, and the unfettering of entails, they were perhaps influenced more by a desire of weakening the power of the nobles, and rendering the authority of the crown predominant, than by any other motive. It may therefore be a question, whether, notwithstanding the benefits that have been derived from a contrary practice, the courts of law ought not to be strictly confined within the boundaries of a power purely executive? But, even in that case, as they must be the expounders of the law, and as it is difficult to frame any law which does not admit of great latitude in its interpretation, they must still,

lease of the inheritance from his lessor, on such lessee's entry into the premises: for he has a no-

to a certain extent, exercise a discretion which, on many occasions, will appear to trench on the legislative authority. And it is always to be kept in mind, that the greater part of our law has been formed in the courts, without the interference of the legislature, by an application of the principles of the preceding decisions to the successive cases that arose, and that these principles must be applied by the courts in the expounding of any positive law, where they are not absolutely abrogated by, and repugnant to, its enactments. The Courts in raising a constructive tenancy from year to year, instead of an estate at will, in all cases where the acts of the parties, independently of any actual agreement between them, would afford ground for implying an agreement, that such a tenancy should exist, appear to have been influenced chiefly as Mr. Watkins has stated in the text by the consideration of the inconvenience attached to a strict tenancy at will. When therefore they had by their decisions, in cases where there was no immediate reference to that part of the Statute of frauds which relates to parol leases, established the circumstances from which the tenancy from year to year should be implied, the question was whether the principles which governed those cases could be applied to the case of a parol lease which was void by that statute; and the Courts determined that they could. The grounds of this determination appear to be, that the object of the statute was principally to render invalid any parol agreement for a lease for a longer term than three years; and as the constructive tenancy from year to year, arising from the mere possession at an annual rent, was not then established, the statute could only refer to a tenancy at will, when it avoided the actual agreement between the parties: but after the tenancy from year to year was raised by implication of law from the acts of the parties, the Courts did not feel that they violated the inten-

torious possession on entry, [and there is a privity between him and the lessor,] and the reversion or inheritance may be released to such an one.*

tion of the statute in giving the same effect to the possession and payment of rent by a person who entered under a parol lease void by the statute, which they would have done, had the same circumstances occurred unconnected with such parol lease, and they therefore felt themselves bound by the prior decisions to put the same construction upon those circumstances, as evidence to infer an agreement for a tenancy from year to year, notwithstanding the agreement between the parties, which in consequence of the statute could not be taken into consideration. They do not therefore give any effect to a parol lease which the statute has rendered null, but merely presume, consistently with their decisions in other cases, an agreement for a different kind of tenancy, where the facts of the case will warrant that construction. And it should seem that in conformity with these principles they would construe a possession taken under a parol lease void by the statute, as a strict tenancy at will, where no act is done by the lessor, by acceptance of rent, or otherwise, to raise by implication a tenancy from year to year; but where such acts take place that tenancy will be implied.

* It appears that the acceptance by a lessee for years of an estate at will, in the land comprised in his lease, would be a surrender in law of his term, Mellows *v.* May, Cro. Eliz. 874, & 6 Com. Dig. 306. It is also to be observed that a remainder cannot be limited on an estate at will; for by the limitation over, the will of the lessor is determined; and then the remainder cannot be good, as a remainder, for want of a particular estate; and it cannot be good as an estate in possession, because it was granted as a remainder, 5 Bac. Ab. 822. tit. remainder G.

Since the Courts have favoured the constructive tenancy from year to year, there are few instances now, in which proper tenancies at will exist; but that estate has by no means been abolished, and will arise, *first*, where there is an express letting at will, Richardson *v.* Langridge, 4 *Taunt.* 128. *Secondly*, where the raising a tenancy from year to year by implication alone would make a forfeiture; for there the implication is stronger that the lessor did not mean to commit an act which would forfeit his estate, than that he intended to lease from year to year; and because, as has been observed in the text, a mere construction of law shall not be allowed where it will work an injury. And, *thirdly*, where there is an entry with the consent of the legal owner of the land, but no express agreement or conveyance which will confer a legal interest, nor any payment of rent to raise a constructive tenancy from year to year: The last branch includes an entry under a deed of feoffment before livery of seisin, *Litt.* s. 70; entries under other defective assurances; for distinction on which head see third resolution in Buckler's cases, 2 *Co.* 55. b.; and also it is presumed, entries under contracts for leases, where rent has not been paid, or for the purchase of estates, and the cases of a mortgagor and cestui que trust, when in possession.

As the different relations which may legally subsist, between a mortgagor and *cestui que trust* in possession, and the mortgagee and trustee, according to the circumstances which may take place; and the possession of persons entering under contracts for leases, or purchase, have not, as we are aware of, been considered and brought into one point of view in any of the books, and as the cases on these points are in some degree contradictory, or at least obscure; it is thought that a few observations on each separately in this place will be useful to the student, though the discussion may lead us in some measure beyond the immediate object of this chapter.

I. *The case of a mortgagor in possession.*

The cases are rather confused as to the character in which a mortgagor in possession is to be considered; in some he is called tenant at will, in others tenant at sufferance, and in some he is viewed in the light of a receiver. The point may not be of any material consequence, further than as it is important in all cases that a construction should be adopted consistent with the general principles of law; and as the privity which may exist between the mortgagee and a mortgagor in possession, in consequence of a tenancy being considered as subsisting between them, may materially affect the operation of a conveyance from the former to the latter.

Observations on the estate of a mortgagor in possession. See Birch *v.* Wright, 1 *T.R.* 378, and the cases cited below. 2 *J.* and *W.* 183, 513. and *A.* 604, 687.

The following remarks are therefore intended as an attempt to elucidate the different characters in which a mortgagor in possession may be considered. *First*, Where the mortgagor is himself the occupant, and there is an express agreement that he shall continue in possession till default in payment of the mortgage money at a particular period; he may in the mean time either be considered as a tenant to the mortgagee, holding a legal interest of the nature of a term of years during such period; or, if the agreement cannot be considered as operating as a grant for the time, he may be regarded as tenant at will to the mortgagee under it. To the former construction it may be objected, that if the mortgagor be considered as holding a term, such estate would, on his death, vest in his personal representatives, to the exclusion of the heir, till default in payment; and if the heir previously entered, he might be ejected by them: but to this it may be answered that the heir entering would at law be tenant at will to the personal representatives; and as they would in equity be considered as trustees for him, a Court of equity would interfere to prevent their ejecting him. We therefore incline to the opinion that notwithstanding the objection, the first construction is the most consistent with legal principles. Against the construction of a tenancy at will, there is the agreement on the part of the mortgagee, for quiet enjoyment by the mortgagor till default in payment, which is

Argument in Powsley *v.* Blackman, *Cro. Jac.* 659. Per *Holt*, in Smartle *v.* Williams, 1 *Salk.* 245.

inconsistent with an estate at will between them. And we do not see upon what principles such an agreement can be held to estop the mortgagee from his ejectment, except upon the ground of its conferring a legal interest on the mortgagor, which must in its nature be a chattel interest. *Secondly*, If, where there is an agreement for possession by the mortgagor till after default in payment, the money is not paid, and the mortgagor being the occupant, continues in possession after the time fixed for payment, without any new agreement between him and the mortgagee, he appears, until payment of interest, to become a tenant at sufferance to the mortgagee. *Thirdly*, If there be no express agreement originally, as to the period of possession, and the mortgagor, being the occupant, remain in possession with the consent of the mortgagee, it should seem that in such case he ought to be considered strictly as tenant at will. *Fourthly*, In the latter case, the transfer of the mortgage by the mortgagee, without the concurrence of the mortgagor, would be a determination of the will, and the mortgagor would become tenant at sufferance to the assignee, until payment of interest. And wherever the mortgagor is to be considered as tenant at will, the death either of the mortgagor or mortgagee determines the estate. In the case of the death of the latter, it is apprehended the mortgagor becomes tenant at sufferance to the representative of the mortgagee, until payment of interest; but in case of the death of the mortgagor, if his heir or devisee enters, and holds, without any recognition of the mortgagee's title, by payment of interest or any other act, an adverse possession takes place. *Fifthly*, In all cases where a tenancy at sufferance would exist between a mortgagee and mortgagor, and also where even an adverse possession would commence, as by the entry of the heir or devisee of the mortgagor, without the consent of the mortgagee, it is apprehended the payment of interest would be a recognition of the title of the mortgagee, and evidence of an agreement that the mortgagor or person deriving title from him should hold at will, and a strict tenancy at will would

Keech *v.* Hall, 1 *Doug.* 22.

Smartle *v.* Williams, 3 *Lev.* 387. and 1 *Salk.* 245.
Thunder *v.* Belcher, 3 *East.* 449.

Per *Holt*, in Smartle *v.* Williams, 1 *Salk.* 245.

Holland *v.* Hutton, *Carth.* 414. and 10 *Vin. Ab.* 418, pl. 19.

then commence. *Sixthly*, Where the estate is in the occupation of tenants, and the mortgagor is left merely in the receipt of the rents, it is apprehended no actual tenancy arises between him and the mortgagee; but he is to be considered merely as a receiver, without liability to account.

Moss *v.* Gallimore, 1 *Doug.* 283.

In all the instances before mentioned, where the mortgagor is the occupant, except the single one of the entry of his heir or devisee, without the consent of the mortgagee, or payment of interest, there appears ground to consider an actual tenancy as subsisting between a mortgagor and mortgagee; and if so, the former, according to the nature of his tenancy arising from the several circumstances before mentioned, is placed in the same relation to the mortgagee; and it is apprehended with the same privity, where a privity is by law attached to the tenancy, as an indifferent person would be placed in and possess, under the like tenancy; and though it would not be advisable in practice to rely on the existence of such privity as the foundation of a conveyance between the parties, yet it is submitted that it may be fairly urged in support of a title where circumstances require the aid of such an argument. It is to be observed, however, that where a mortgagor is considered as tenant at will, there is this difference between him and other tenants of that description. *First*, He is not entitled to emblements, because the right to emblements arises from the equity recognized by law as subsisting between the parties; and the mortgage debt being a charge which the mortgagor ought to pay, there is no equity for him as against the mortgagee, that the emblements should not go in discharge of the debt. *Secondly*, He may be ejected by the mortgagee, without any previous determination of the will. The reason for which seems also to depend upon the relative situation of the parties; for whilst he is in possession, he receives the whole profits, without any compensation to the mortgagee beyond the interest of the money secured, which however cannot be considered in the nature of a rent.

In Birch *v.* Wright, 1 *T. R.* 382. the relation of the mort-

Birch *v.* Wright, *ubi supra.*

gagor and mortgagee is very elaborately entered into by Mr. Justice Buller, who, in his judgment, argues that there is no actual tenancy between them, when the mortgagor is in possession. But an examination of the cases certainly shews that the courts of law have considered a tenancy as subsisting where the circumstances allow of such a construction, and it is submitted that they cannot take into consideration the *equitable* relation of the mortgagor and mortgagee, further than in the points already noticed; their jurisdiction, with regard to the possession of real property, and the title to it, except in the case of actual fraud, being confined to the *legal* estates and rights of individuals.

It may be observed here, that the Court of Chancery will, by injunction, restrain a mortgagor in possession from committing waste. *Per* Lord Hardwicke in Farrant *v.* Lovel, 3 *Atk.* 723. which perfectly accords with the legal relations in which we have considered him.

II. *The case of cestui que trust in possession.*

Observations on the estate of a *cestui que trust* in possession.

In equity, the person beneficially interested, who is called the *cestui que trust*, is considered as the real owner of the estate, and the possession of the trustee is always considered as that of the *cestui que trust*; but at law the trustee alone must be considered as the tenant according to the quantity of his estate; so far even, that where his estate is in fee-simple, it would be subject to escheat on failure of his heirs. The *cestui que trust* therefore, being in the possession of the estate, with the consent, or even the mere acquiescence, of the trustee, must be regarded as his tenant at will, in order to preserve a consistency between this case and the general principles of law. The following reasons may be given in support of this construction, and may assist the young student in tracing the principles upon which a constructive tenancy at will may be contended for in other instances, where a mere possession is taken with the consent or acquiescence of the person entitled to give it. It may be urged, that in

See 4 *Bac. Ab.* 198, and the cases of Smith *v.* Pierce, 3 *Mod* 195. Focus *v.* Salisbury, *Hard.* 400. Freeman *v.* Barnes, 1 *Vent.* 55. 80. and 1 *Lev.* 270. there cited; and Pomfret *v.* Windsor, 2 *Ves.* 481.

every case where the bare possession is in one person, and the immediate legal estate, either of a freehold nature, or for a term of years; in another, such possession must legally be considered, either as derived from the estate which the law recognizes as subsisting, or as adverse to it. If the possession in the instance before us were to be considered as adverse, the *cestui que trust* would be viewed as gaining the fee by disseisin, and the estate of the trustee would then be turned to a mere right. This construction, however, would, in many instances defeat the object for which the trust was created, and would often give the *cestui que trust* a greater estate at law than he previously had in equity; and it appears to be completely excluded where the possession is acquired, or continued, with the concurrence or acquiescence of the trustee. Besides the disseisin must, in this, as in any other case, be considered as a wrong in a court of law, notwithstanding the equity subsisting between the parties; and the courts will not presume a wrong where any principle can be raised to support the possession as lawful, and much less against the manifest intent of the parties. But, to make the possession lawful, some tenancy must be raised; and the only one which can be resorted to is a tenancy at will. This preserves the interest of the *cestui que trust*, and the estate of the trustee; and answers the intention of the parties without producing any injury, further than the inconvenience which always attends the placing of the legal estate in another person.

Regarding, therefore, the *cestui que trust* in possession as tenant at will to the trustee, we have further to consider how this tenancy is affected by the death of the parties: for if a tenancy at will be raised, it must be attended with the consequences attached to that tenancy as to its determination; and the death either of the trustee or the *cestui que trust* must determine the estate at will subsisting between them. In the case of the death of the former, a tenancy at sufferance may either be considered as existing between the

real or personal representative of the trustee, according to the quantity of his estate, and the *cestui que trust*; or both in that case, and in the instance of the death of the *cestui que trust*, a new tenancy at will may be raised between the parties succeeding to the title, or possession, on the ground of an implied agreement between them, where no act is done to evidence an intention of adverse possession. For though the courts may set their faces against raising a tenancy at will by construction, where it produces inconvenience, there is no reason why they should oppose such a construction where it is beneficial, and preserves an uniformity with the general principles of law. And in the latter instance, either a new tenancy at will must be raised, or the possession must be treated as adverse, to the injury in many cases of persons interested under the trusts. It is apprehended that where there is an actual recognition of the estate of the trustee, a new tenancy at will must be raised; but it is difficult to say what acts are to be considered as recognizing such estate, there being no payment of rent, or interest, between the parties, and probably no other act required at the time which would imply a recognition. It seems, therefore, in these instances more conformable to the intent of the parties, and to the views of justice, to raise by implication a legal tenancy between them, on the ground of an assumed recognition of title, unless there be some act which demonstrates a contrary intention; rather than to require actual evidence that the title was recognized, and possession taken or continued with the consent of the trustee, and, in the absence of such proof, treating the possession as adverse. The application of this principle may, however, require to be admitted with some modification; and there may be instances in which it would not be proper to act upon it, as where a legal estate, or particular trust-estate, has been left outstanding for a considerable length of time, without treating it as existing in another person, and especially where the trust was originally created for a particular purpose, which has been satisfied. But it is apprehended that

even in such cases, the union of the legal and equitable title, or the title to the possession, is rather to be founded on the presumption of a conveyance of the legal estate, or surrender of the particular trust estate, than on the ground of the acquisition of a seisin adverse to it.

It is to be observed, that the above discussion applies only to the case where the *cestui que trust* is the actual occupant of the estate, and not the mere receiver of the rents. There does not appear any reason why the receipt of rent alone should give any greater right to a *cestui que trust* than any other person; and the receipt of rent will not, of itself, create any tenancy, nor does it confer any right to, or divest any estate in, land. It is further to be remarked, that, though the possession of the trustee is always to be considered as that of the *cestui que trust*, and that a possession cannot be raised in the former adversely to the latter, so as to bar him in equity; yet the *cestui que trust* may, by acts clearly manifesting such an intention, gain a legal possession adverse to his trustee; and such acts will operate in the same manner against the estate of the trustee, and be attended with the same consequences as if no equitable relation subsisted between the parties: in such cases therefore there is no room for the application of the reasoning on which the above observations are founded.

Litt. s. 588 to 591, and Comment.

III. *Entries under contracts for the purchase of estates, for leases, &c.*

Observations on an entry under contracts for the purchase of estates, agreements for leases, &c.

From the principles we have been discussing, it also seems to follow as a consequence, that an entry by a person under a contract for the purchase of an estate, or an agreement for a lease, with the consent of the vendor, or the person agreeing to grant the lease, must raise a strict tenancy at will between them. In this instance also the possession must, as we have before observed, either be referred to some legal title, or be held adverse; and the latter it cannot be, where

the entry is with the consent of the person entitled to the possession: on the other hand, the contract or agreement confers no legal estate; one must therefore be raised by construction of law, from the acts of the parties; and no other estate than a tenancy at will can, it is apprehended, accord with their situation: whilst there is nothing in such a situation, or in the existence of any equitable right between them, arising from their contract or agreement, inconsistent with this estate, until either the contract or agreement is carried into execution, or some legal foundation is laid, by payment of rent, or other act, for implying another tenancy.

Right v. Beard, 13 *East*, 210. Doe v. Jackson, 1 *Barn. & Cress.* 448. Doe v. Sayer, 3 *Camp.* 8.

The case of Right v. Beard, 13 East. 210, has decided that a person entering under a contract for the purchase of an estate, with the consent of the vendor, cannot be ejected without a demand of the possession, or the commission of some wrongful act to determine his lawful possession; but he was not directly considered as holding at will. It is, however, submitted, for the reason before stated, that he must be considered in that character, and that his possession cannot, on any other ground, draw to itself the consequences which were in that case considered as legally attached to it.

Hegan v. Johnson, 2 *Taunt.* 148; and see Dunk v. Hunter, 5 *Barn. & Ald.* 322. Doe v. Lawder, 1 *Stark.* 308.

With regard to an entry under an agreement for a lease, the judgment in Hegan v. Johnson, 2 *Taunt.* 148, may be considered as at variance with the construction of a tenancy at will. The occupier had there been in possession three quarters of a year, under an agreement for a lease, without payment of rent; and the court is reported to have held, that he was not tenant from year to year; and that if before the end of the first year a lease were tendered to him, and he refused to execute it, the lessor might eject him without notice; and that, when a person was so foolish as to enter under an agreement for a lease, without a stipulation, that, in case no lease was executed he should hold for one year certain, the landlord might, if he did not execute, turn him

out without notice; and that the effect was, that the lessor could not distrain for the rent, he must bring his action. This certainly was saying there was no tenancy at all existing between them; for if there were only a tenancy at will, the landlord might distrain for the rent, and could not eject the occupier without a previous demand of possession, or, in other words, a determination of the will by a notice to quit. But it is submitted, that the latter point was not before the court, and that the opinion given on it is in direct opposition to the later decision in Right *v.* Beard; for where the agreement on which the tenant is put into possession confers no legal title, the nature of such agreement, whether relating to the purchase of the fee, or the grant of a lease, is immaterial, with reference to the legal construction which is to be put upon the bare fact of possession being taken with the consent of the person legally entitled to give it. The determination, therefore, in Right *v.* Beard, must, it is conceived, be considered as having settled that point. As to the point immediately before the court, in Hegan *v.* Johnson, that of the distress, it was argued on the ground only of a tenancy from year to year, which the agreement did not support, and there were no circumstances in the case to raise it by implication; but the existence of a tenancy at will was neither mentioned in the argument, nor adverted to by the court, except so far as the judgment may be construed as negativing such a tenancy. If, however, there was not a tenancy at will, there was no tenancy at all; and if the case is to be considered as deciding that no tenancy existed, it must be on the ground, either that a possession taken with the consent of the person legally entitled to give it may be adverse to the title of such person, or that a possession which is not adverse, and is not that of a mere bailiff, in the modern import of that word, may legally exist, without any tenancy between the occupier and the person giving possession, neither of which positions, it is submitted, can be maintained, consistently with the English law of real property, and the doctrine of tenure on which it is founded.

Litt. s. 72.

See *Adam's Eject.* 98. and *Cham. L. & T.* 17.

The case of Hegan *v.* Johnson, therefore, it is conceived, cannot be received as an authority against a constructive tenancy at will being raised on an entry with consent under an agreement for a lease; and there appears nothing in the circumstances connected with such an entry, to make any difference between it and other entries with consent, where no freehold is claimed, and no actual estate is granted, which have always received the construction of tenancies at will. This, indeed, is the general principle which governs all the particular instances we have been considering, and which must, it is presumed, govern all cases where it can be applied, whatever may be the peculiar circumstances of each case to make it different in other respects. It may also be observed, that there does not appear any reason why the court should not in all cases raise by construction a tenancy at will, from the mere fact of an entry with consent, so long as there are no other circumstances to alter that construction, notwithstanding the existence of any agreement between the parties, connected with such entry, referring to the grant or conveyance of a greater estate, in the same manner as they have raised a constructive tenancy from year to year, from the circumstance of the payment of an annual rent, where the agreement of the parties has had a reference to a larger estate.

See Blunden *v.* Baugh, *Cro. Car.* 302. *Co. Litt.* 270. b. and 4 *Comyn's Dig.* 58.

In forming a judgment on an estate at will, the student should be careful not to confound that tenancy with the tenancy from year to year, which has almost superseded it, and which in many of the cases, and in many books, is improperly called a tenancy at will. The tenancy from year to year is, however, a distinct tenancy, partaking of the nature of a term of years, with its own peculiar qualities attached to it relating chiefly to the mode of determining it. An estate at will, where it actually subsists, is still governed by the same principles as formerly; and where from particular circumstances a tenancy from year to year is raised by construction of law, such estate, what-

See a remarkable instance in Parker *v.* Constable, 3 *Wils.* 25.

See the next chapter *in notis*.

ever the estate from which it is raised may have been originally, can no longer be called an estate at will without introducing a confusion of terms.

TENANCY BY SUFFERANCE.

In the preceding observations we have had occasion to notice a tenant at sufferance; and a few remarks on the nature of that tenancy may be necessary, as Mr. Watkins has omitted any mention of it. A tenancy at sufferance is the lowest estate which can subsist; it arises where a person has held by a lawful title, and continues the possession after his title is determined, without either the agreement or disagreement of the person then entitled to it. As where a tenant at will continues in possession after the death of the lessor, or a lessee for years holds over after the expiration of the term, or a tenant for another man's life keeps possession after the decease of the person for whose life he held, in all these cases the tenant remaining in possession, without the consent or dissent of the person entitled to enter, becomes tenant at sufferance to the latter. This tenancy, therefore, can arise only by construction of law, and cannot originate in the agreement of the parties, the law presuming only that the possession is continued by the permission of the person entitled to it. If such person actually agree to the continuance of the possession, a tenancy at will, or from year to year, will arise between them, according to the nature of the agreement; and the payment of an annual rent, where there are no circumstances attending the payment and receipt of it to oppose such a construction, will also raise a constructive tenancy from year to year: but so long as the occu-

2 *Blackst. Com.* ch. 9. p. 150
Co. Litt. 57 b.
4 *Comyn's Dig.* 66 *Tit. Est.*(1)
10 *Vin. Ab.* 414 to 420.
1 *Rolle's Ab.* 861.
1 *Cruise's Dig.* 287, 2d ed.

Roe *v.* Ward, 1 *H. Blackst.* 97.
Doe *v.* Watts, 7 *T. R.* 83.
Bishop *v.* Howard, 2 *Barn. & Cress.* 100.

Sykes d. Murgatroyd and Wilkes v. —— cited 1 *T. R.* 161.

Co.Litt. 270. b.

Butler *v.* Duckmanton, *Cro. Jac.* 169.

pation is merely continued with the bare acquiescence, or without the disagreement, of the person entitled to the possession, a tenancy at sufferance subsists. It follows from this statement, that there is not any privity between a tenant at sufferance, and the person entitled to the possession: and, consequently, a release from the latter to the former will not operate to enlarge his estate.

Co. Litt. 57 b. Smartle *v.* Williams, 3 *Lev.* 387; but consider Fisher *v.* Prosser, *Cowp.* 218, Roe *v* Ferrars, 2 *Bos.* & *Pul.* 542, and Doe *v.* Pettet, 5 *Barn.* & *Ald.* 223.

This estate cannot, from the nature of it, be the subject of conveyance or transmission, any more than an estate at will; but while it subsists, the possession of the tenant is not adverse to the title of the person entitled to enter; although such person may, if he chooses, consider it so. This may, perhaps, be one reason why the law raised the tenancy, as particular estates may often determine, and the reversioner remain ignorant that they have ceased; and if in such cases the mere continuance of possession by the tenant were held adverse, the reversioner might be barred of his remedy by lapse of time, before he even knew of his right to enter. The raising of a tenancy at sufferance prevents this; and preserves his right of entry, so long as the same tenant continues in possession, and commits no wrongful act, inconsistent with the admission or existence of the title of the reversioner.

Smartle *v.* Williams, *ubi supra.*

The descent or conveyance of the reversion does not appear to affect the tenancy; but the entry of any person claiming title from the tenant, and without the consent of the reversioner, in the event of the death of the tenant, or in consequence of his alienation, would be adverse, as they cannot derive a lawful title from him. An attention to these points may be important in many cases; for instance, where a tenant for life attempts to alien in fee by a conveyance which does not operate as a forfeiture, as by lease and release, or bargain and sale, which conveyances will only, in fact, pass his life estate: the person, therefore, in possession under them at the death of the tenant for life will become tenant at sufferance to the reversioner, and adverse possession will commence only from the commission of some wrongful act

by the tenant, or from the change of the tenant of the land, in consequence of death or alienation.

In the case of the Crown there is no tenancy at sufferance; and if the King's tenant holds over, he is an intruder: but, on the other hand, there was not, at the common law, any limitation to the claim of the crown; and the rule *nullum tempus occurrit Regi* preserved the title of the Crown in all cases prior to the statutes 21 Jac. I. c. 2. and 9 Geo. III. c. 16.

Co. Litt. 57 b.

Co. Litt. 41. b. 294. b. 1 *Blackst. Com.* 247.

It is perhaps necessary in this place to offer a few remarks to the student on the case of Doe *v.* Perkins, determined in the Court of King's Bench as bearing on the point when adverse possession is to be considered as arising after a tenancy at sufferance has taken place. The circumstances of the case were, a tenant *pour autre vie*, continued in possession six years after the death of the person for whose life he held without payment of rent, and then died; on his decease, his son entered, and continued in possession more than a year, without payment of rent, or having any demanded of him; he then levied a fine, and afterwards remained in possession some years without paying any rent; an ejectment was then brought against him by the person entitled to the reversion on the death of the tenant for life, and the court determined that no actual entry was necessary on his part to avoid the fine levied by the person in possession. The counsel who argued the case appear, from the report, to have considered the person in possession as tenant at sufferance; or, at furthest, the counsel for the defendant only urged the possession as adverse on the ground of a descent being cast, a point which certainly could not be maintained, for a descent which confers an adverse possession must be from a person whose possession was also adverse. But in this case the possession of the father was clearly a tenancy at sufferance after the decease of the person for whose life he held; and, consequently, not adverse to the title of the reversioner. The court also appears to have treated the possession of the son

Doe *v.* Perkins, 3 *Maul.* and *Sel.* 271.

as a tenancy at sufferance, and seemingly as a continuation of the possession of the father. This case, therefore, if it is to be received as an authority, is directly opposed to the proposition that the entry of a person without the consent of the reversioner on the death of a tenant at sufferance, is adverse to the title of such reversioner. But it is with deference submitted, that this decision, and the principles laid down in all the law books as the foundation of a tenancy at sufferance, cannot stand together. It appears to be essential to the raising of a tenancy at sufferance that the person in possession should have originally held by lawful title. And it is clear that, as a tenant at sufferance has nothing but the bare possession without any title, he has no estate which he can convey, or which can descend. A person, therefore, entering under his conveyance, or on his death, cannot be considered as continuing the possession of such a tenant; and as the entry of such person is not by lawful title, he cannot become tenant at sufferance on his own possession. Now the entry of the son in the above case was either by lawful title, or wrongful; if by title, it must have been derived either from his father or the reversioner; but his father had no descendible estate, and it is admitted that he entered without the agreement of the reversioner. Under such circumstances, it does not appear how his entry could be otherwise than by wrong, and then he could not become a tenant at sufferance.

Co. Litt. 57. b. Rous and Artois case, 2 *Leon.* 47. and Berry and Goodman's case, *ib.* 147.

If, however, the possession of the son could not be treated as a tenancy at sufferance, it is to be considered on what other ground it could be placed to avoid the consequence of its being adverse. On this point it is conceived, that every possession which is continued for a length of time, and accompanied with an actual perception of the profits, must, in order to reconcile it with the title of the freeholder, be referred to the existence of some tenancy, either by express contract, or by construction of law, between the latter and the person in possession; and if such a tenancy cannot be proved, the possession must, it is presumed, be considered

as adverse, unless we are to admit that, at the present day, no possession can be acquired adversely to the freeholder. It is true that entry alone will not create a disseisin or intrusion; it must be accompanied with some act which the law construes as an ouster of the freeholder; such as claiming, or taking the profits, contrary to his title: but where there is an entry which is not congeable, and a claimer or a taking of profits, such entry is adverse. In the above case there was an entry without any title, and the possession was held, and the profits taken for years, without the recognition of the title of any other person; and the very levying of the fine was, it is conceived in this instance, coupled with the entry, a claimer of the freehold. Such a possession could not be referred to any subsisting tenancy; it was admitted there was none by the agreement of the parties, and we have shewn that none could in such a case be raised by construction of law; the entry and possession cannot, therefore, it is apprehended, consistently with any recognized principles of law, be considered in any other light than tortious and adverse. And it is submitted that the case cannot be acted upon as an authority against the proposition advanced in the above observations, that an adverse possession will take place on an entry and perception of profits by a person without the consent of the reversioner after the death of a tenant at sufferance.

CHAP. II.

OF A TERM OF YEARS.

2 *Bl Com* c. 9. s. 1. p. 140—5. and c 20. p. 31 *Litt*. b. 1. c. 7. and the *Comment*. *Touchst*. 266. ch. 14 *Bacon's Abr*. Tit. Lease. 4 *Comyn's Dig*. 15. Tit. Est. (a)

THE next estate with respect to the duration of interest, is that which the law denominates *a term*;* and it is so denominated because its duration is *absolutely defined*. The duration of an estate at will is dependent *upon the pleasure of each party*; and an estate for life, in tail, or in fee, is *uncertain* in its duration, as its con-

Doe *v*. Rosse, 5 *Barn. & Ald.* 766.

Tenancy from year to year.

* And every tenancy of a definite duration is a term, and of the nature of a term of years, though for a less period than a year, *Litt*. 67. And a tenancy from year to year, though raised by construction of law, appears to partake of the same quality: it is transmissible to the personal representatives, who are entitled to the same notice to quit as the original lessee, Doe *v*. Porter, 3 *T. R.* 13, and per Lawrence, J. in Rex *v*. Stone, 6 *T. R.* 298, and the Courts of Equity will fasten a trust upon the interest which devolves to the personal representatives, James *v*. Dean, 11 *Ves. J.* 383. and 15 *Ib*. 236. It is also assignable, where there is not any special agreement to the contrary; and an assignment of it is within the 3rd section of the statute of frauds, and must be in writing, Botting *v*. Martin, 1 *Camp. Ca. N. P.* 317, as must also a surrender of it for the same reason, Mollet *v*. Brayne, 2 *Ib*. 103, and

Thompson *v*. Wilson, 2 *Stark*. 379.

tinuance is dependent upon an uncertain event: that is, upon the death of the individual, or the

10 Vin. Abr. 319. 1 Rolle's Ab. 846. 1 Cruise's Dig. 2d ed. 256.

Doe v. Ridout, 5 *Taunt.* 519, but see Whitehead v. Clifford, *Ib.* 518, except where it arises by act and operation of law; as where another becomes tenant with the assent of both the orginal lessor and lessee, Thomas v. Cook, 2 *B. & A.* 119, Stone v. Whiting, 2 *Star.* 236. And this species of estate is not within the late act 1 Geo. 4. c. 87, as to holding over, unless the agreement to let be in writing. An estate from year to year may be created either by the parol or written agreement of the parties. The qualities that distinguish it from proper terms for years, and from estates at will, are, that it is now raised by construction of law alone, instead of an estate at will, in every instance where a possession is taken with the consent of the legal owner, and where an annual rent has been paid, but without there having been any conveyance or agreement conferring a legal interest; and that, whether it arises from express agreement, or by implication of law, it may, unless surrendered or determined by a regular notice to quit, subsist for an indefinite period, if the estate of the lessor will allow of it, or for the whole term of his estate, where it is of a limited duration, unaffected by the death either of the lessor or lessee, or by a conveyance of their estate by either of them, Birch v. Wright, 1 *T. R.* 380; and the assigns, or real or personal representatives, of the former according to the quantity of his estate, and the assignee, or personal representatives, of the latter, still continue the tenancy upon the original terms, and subject to the same conditions which the law, or the express agreement of the parties, has attached to it. But it is liable at any time to be determined by a notice to quit, from either party, which, where there is no agreement, or where the agreement is silent on that point, must be at least half a year's (and not merely six months') notice, requiring from the tenant, or offering on his part, to give up possession at the expiration of the year, computing from the time when the tenancy commenced, Right v. Darby, 1 *T. R.* 159. And a parol notice

Doe v. Roe. 5 *B. & A.* 770.

Doe v. Donovan, 2 *Camp.* 78. Kemp v. Derret, 3 *Ib.* 510.

extinction or failure of heirs, either special or general. Hence, then, must a term, from its very

is sufficient, unless the agreement requires it to be in writing, per Lord Ellenborough, C. J. in Doe *v.* Crick, 5 *Esp. N. P. C.* 197; but for the sake of evidence it is always advisable to give a written notice. Where different parts of an estate are let from different periods, without any agreement as to the time when the whole is to be considered as let together, the commencement of the year, with reference to the notice to quit, will be computed from the entry on that part which is considered as the substantial or principal object of the demise; Doe *v.* Spence, 6 *East.* 120, Doe *v.* Watkins, 7 *Ib.* 557, and which is a fact for the determination of the Jury where it is disputed, Doe *v.* Howard, 11 *East.* 498. In cases where the commencement of the tenancy cannot be ascertained, a notice served personally on the tenant, requiring him to quit at the end of the year, regulated by the times of the payment of the rent, will be *primâ facie* evidence of the commencement of the tenancy at such period, unless the tenant actually prove the contrary, or object to the notice when served on him, Doe dem. of Leicester and others, 2 *Taunt.* 109, Doe *v.* Forster, 13 *East.* 405, Doe *v.* Woombwell, 2 *Camp. N. P.* 559, and Thomas *v.* Thomas, *Ib.* 647. But if the notice in such a case be not personally served on the tenant, it will not of itself be received as sufficient evidence of the commencement of the tenancy, Doe. *v.* Foster ubi sup., and Doe *v.* Calvert, 2 *Camp. N. P.* 388. Where the tenant informs his lessor of the time of the commencement of the tenancy, he will be bound by a notice given by the lessor to him according to his own statement, although such statement was wrong unintentionally, Doe *v.* Lambly, 2 *Esp. N. P.* 635. And where the commencement of the tenancy is not known, and the lessor cannot, from the objection of the tenant to the notice, or any other cause, avail himself of the periods of the payment of the rent as presumptive evidence of the commencement of it, a notice from him requiring the tenant to quit, at the expiration of the current year of the

nature, have a certain beginning, or definite commencement, and a certain or definite period beyond which it cannot last.* But though it be

tenancy, which shall expire next after the end of half a year from the date of the notice, will be sufficient, Doe *v.* Butler, 2 *Esp. N. P.* 589. But it seems advisable in such a case to give the notice on one of the quarter days on which the rent is payable, and not to bring an ejectment before the expiration of a year and a quarter from the date of the notice, in order to be certain that the year of tenancy has expired. It is to be observed that when a notice to quit has been given, the acceptance by the lessor or his agent, of rent which accrues due subsequently to the determination of the tenancy according to the notice, will be a waver of the notice, unless in the case of an agent he was ignorant of the notice having been given, and had no special authority to receive the particular rent, Doe *v.* Calvert, ubi sup. As a tenant from year to year has, after entry, a possession with a privity, he is capable of receiving a release by way of enlargement of estate from his lessor.

* The commencement of leases for years may be considered either with regard to the time of the computation of the term, or the commencement of the interest. The certainty of the time of computation may be fixed by reference, either to the time of the making of the lease, or to a past or future period, or a past or future event; and the event, if future, may be contingent; or such time may be referred to the nomination of a third person, in which case it must be fixed in the life-time of the parties to the lease. When no time of computation is referred to, or the time referred to is an impossible date, or where a lease is made to begin from the end of a lease which is misrecited, the commencement will be computed from the delivery of the lease. The commencement in interest, when the time of computation is immediate, or from a past period, may either begin immediately, or be postponed to take effect at a future period, or on a future event, either absolute or contingent; but when the time of computation is from a past

essential to its very existence that there be a time absolutely prefixed *beyond which it cannot continue*, yet it may be made subject to a condition [depending on the dropping of any life or lives, or on any other contingent event,] for its determination before the period prefixed: as for ninety-nine years, if *A. B. lives so long*. Here, if *A. B.* die before the ninety-nine years expire, the term shall cease: but though *A. B.* should survive the ninety-nine years, the lease, on the expiration of the ninety-nine years, would be absolutely at an end.

The grant of such an estate is usually entitled *a demise* or *lease;** and the proper words of creation are those of "demise, lease, and to farm let;" though it may be created by other means, as by bargain and sale, though without enrolment.† An estate for years relates only to the *possession*, and does not effect the *seisin* of the lands. It is what the law calls a *chattel*

See the next chapter.

period, the commencement in interest cannot be retrospective so as to take effect before the making of the lease. When the time of computation is future, the commencement in interest cannot of course take effect earlier; but it may be postponed beyond such period, and made to depend on a collateral event, absolute or contingent.—On the subject touched upon in this note, and the certainty requisite to leases for years. see 4 *Bac. Ab.* Tit. Leases (L) and *Shep. Touch.* 272.

* The grantee is usually called the lessee, but sometimes he is stiled the termor. *Litt.* s. 60.

† The stat. 27 Hen. VIII. c. 6. is confined to those bargains and sales by which "*an estate of inheritance or freehold*" is intended to pass.—Note by Mr. Watkins.

interest, and is not an estate of freehold, though it be for ten thousand years. Hence, if it be wished that *A. B.* should enjoy certain premises while he lives, it should be enquired into, whether it be the intention of the parties that the estate of *A. B.* should have the properties of a freehold or not, as to support a contingent remainder, to have the right of election of members of parliament, &c. If it *be*, the estate may be limited to *A. B. and his assigns during his life*; if it be *not*, it should be limited to *A. B. and his assigns for a certain number of years, if the said A. B. shall so long live.* In the former case the *freehold* must be passed by livery of seisin, or under the statute of Uses. See the next chapter.

As this estate affects only the possession and not the seisin, it may be made to commence *in futuro*, as from michaelmas day next.* But on the demise of a term, no estate is vested in the lessee, it only gives him a right of entry; and till he actually enter, he has only an *interesse termini*. He cannot *before* entry receive a *con-* 5 Co. 123*b*. Saffyn's case.

* But the time of commencement must not be beyond the period allowed by the rules laid down to prevent perpetuities; for the grant or limitation of a term of years to commence after an indefinite failure of issue, without reference to a subsisting estate tail, or at any other period, or on any other event, which might tend to a perpetuity, would no doubt be held bad. See *Fearne's Cont. Rem.* 6th ed. Appendix, No. 4, *et vide* Beard *v.* Westcott, 5 *Barn. & Ald.* 801. 1 *Turner*, 25.

(a) Co. Litt. 296 b.
(b) Ib. 270. b. Touchst. 324.
(c) Co. Litt. 388 a. 6 East 86.

firmation, (a) or *release* (b) from the lessor; nor can he surrender (c) his interest, except by a surrender in law, as by accepting another lease incompatible with the existence of the first.*

Interesse termini.

* An *interesse termini* is merely an executory interest; and the right to enter under it, except when depending on an estate tail, cannot be barred or affected before the time when an entry would be authorized by the lease, grant, or limitation conferring the interest. When that period is arrived, and the actual right to the possession is accrued, it may be barred like any other right of entry: but although it may then be barred, it cannot, until it is executed in possession by the entry of the person entitled under it, be divested so as to prevent it from being transferred to a stranger, 4 *Bac. Ab. Tit. Leases* 195. And though such an interest cannot before entry be enlarged by a release from the lessor, on account of there being merely an interest and no actual estate in the lessee; yet a release to the lessee before entry, from the lessor of all right that he has in the land, will in respect of the privity between them extinguish the rent. *Co. Litt.* 270 *b.* And the lessor may for the same reason expressly release the rent to the lessee before entry. *Ib.* 46 *b.* On the same principles it should seem that a release to the lessor by the lessee before entry would be held to extinguish his *interesse termini.* And it has been decided that an assignment of it by him to the lessor will have that operation. Salmon *v.* Swan, *Cro. Jac.* 619.

The student will notice that Mr. *Watkins* in the text refers only to leases at the common law, intended to affect the actual possession of the land, to which the observations made by him must be confined, as they are not applicable to terms in remainder, or to terms granted out of a vested remainder, or a reversion, when such terms are vested

An estate for years is assignable, unless there be an express condition or provision in the lease

Doct. & Stud. 27. Dial. 1. ch. 8.

estates, and when they would entitle the termor to the possession, if the particular estate were immediately to determine; for then, though they do not, during the continuance of the particular estate, give a right to the actual possession, yet they are capable of enlargement by release, of being surrendered divested, &c. the same as if the termor were in the possession of the land, &c., *Co. Litt.* 270 *a.* and Mr. *Butler's* note, 227. The observations in the text also do not apply to terms created by a bargain and sale for a year, or for years, by a person seized of the freehold, or to terms created, by way of limitation of use in any conveyance to, or declaration of uses, whether such terms are intended to take immediate effect or to give a future interest; since in the first instance those terms vest immediately and are under the statute of uses executed so as to become an actual estate without entry, immediately on the execution of the bargain and sale, or other cenveyance, by which they were created; and in the latter instance, they are executed by virtue of the same statute, and confer an actual estate without entry, when the period arrives at which they are intended to take effect in interest, unless a disseisin be previously committed. Such terms therefore, as soon as they are executed, are capable of enlargement in point of estate, of being surrendered, &c. without any entry by the person entitled to them. The common conveyance by lease and release derives its effect from these principles, the lease being a bargain and sale for a year, and under the statute of uses giving the bargainee an estate without the necessity of entry by him, and the release operating to enlarge such estate. A mortgage for a term of years also, when made to operate as a bargain and sale, which it ought always to be as well as a grant and demise, gives the mortgagee on the same principle an actual estate immediately on the execution of the deed without entry: but as

to restrict the power of alienation which the law gives;* and such assignment may be made even

a grant, it would not, unless there was a particular estate in existence; and as a demise, it would require entry to vest the term as an estate, and before such entry would give only an *interesse termini*. These last examples are connected with the doctrine of uses treated of in a future chapter: but it is important that the student should mark the distinction between terms created by common law assurances, and those created by assurances which take effect under the statute of uses. It is apprehended also that terms created by a devise in a will do not require entry to vest them as estates. The devise of a freehold interest confers an actual estate on the devisee before entry, *Co. Litt.* 111 *a*. On the same grounds, the devise of a term must, it is presumed, have the same operation; and if so, terms created by devise may be enlarged by release, surrendered, &c., without any previous entry of the termor being necessary to give effect to such release, surrender, &c.

It may be proper also in this place to point out the difference between reversionary leases, and leases or more properly grants of the reversion. A lease granted to a stranger, to commence after the determination of an existing term in the same land, &c., would now, it is apprehended, be in all cases construed as a reversionary lease, and be held to be a mere *interesse termini* till it was executed in possession, by an entry after the determination of the prior lease. But a grant to a stranger of an immediate term of years in an estate already demised, is a grant of the reversion, vested in point of estate on the execution of the grant, and drawing after it the rents and services of the first lessee. Such grants must be made by deed, and formerly required the attornment of the first lessee to perfect them: but by the stat 4 *Ann*. c. 16. s. 9. they are made effectual without attornment.

On conditions in leases.

* On conditions in leases to prevent alienation, or for

before the lessee enter, as an *interesse termini* may be granted over. Or if a lease be made *Co. Litt.* 46 b. *Plowd.* 423. *Co. Litt.* 270 b.

any other purpose, it is to be observed that, where the condition gives to the reversioner a right of re-entry on breach of the condition, the term after the breach still subsists till determined by his entry; and if after he knows of the breach he accepts of or distrains for rent, accrued due subsequently to the breach, it will be held a dispensation with the forfeiture: he may also by confirmation render the estate of the lessee or his assignee again indefeasible. But where the condition, on the breach of it, determines the estate, there, as the term on a breach will absolutely cease, the forfeiture cannot be waved or dispensed with, *Co. Litt.* 215 *a. Cro. Eliz.* 221, nor can a confirmation restore the estate, so as to be the same in point of title, though it may operate as a new lease. *Ib.* 295 *b.* With respect to restrictions on alienation the following points may be noticed. It should seem that a general condition against alienation in a lease to *A.* and his assigns would be avoid, being repugnant to the grant: but if the lease were to *A.* only, and not to him and his assigns, such a condition would be good, *Hob.* 170. And a condition even in a lease which extends to assigns, that the lessee shall not assign to a particular person, or without previous consent, is good. A condition restraining assignment only, will not prevent an underlease, Crusoe *v*, Bugby, 3 *Wils.* 234. & 2 Sir *W. Blackst.* 766: but the terms of conditions restraining alienation should be attentively considered in order to judge whether they are confined to assignment alone, or extended also to under-letting. See Roe *v.* Harrison, 2 *T. R.* 425. Doe *v.* Worsley, 1 *Camp. N. P. Ca.* 20., and Roe *v.* Sales, 1 *Maul.* and *Sel.* 297.; and such conditions will bind the personal representatives where they are named, Roe *v.* Harrison, *ubi sup.* A condition, giving a right of re-entry on assignment without consent, does not prevent the lease from passing by, or entitle the lessor to enter on the assignment made by the commissioners of a

Goodright *v.* Davis, *Cowp.* 803. *Cro. Eliz.* 3.

On the construction of these conditions, *vide* Doe *v.* Banks, 4 *Barn. & Ald.* 401.

Co. Litt. 301 b.

4 *Camp.* 77. 4 *Car.* 160. 2 *Ino. Wils.* 60

to *two*, one may release to the other before entry.

* bankrupt lessee, Goring *v.* Warner, 2 *Eq. Ca. Ab.* 100, 1 Cooke's Bankrupt Laws, 5th ed. 294; nor does it bind the assignees of the bankrupt, an assignment by whom is no forfeiture, Doe *v.* Bevan, 3 *Maul.* and *Sel.* 353. Such a condition is also not broken by an assignment by the Sheriff under an execution, unless such execution be fraudulent, Doe *v.* Carter, 8 *T. R.* 57 and 300. The condition may however be extended to give a right of re-entry, if the lessee commit an act of bankruptcy; and the assignment of the commissioners in such a case will not prevent the entry of the lessor, Roe *v.* Galliers, 2 *T. R.* 133. It seems also that a condition giving a right of re-entry to the lessor, in the event of the lessee becoming insolvent or committing any act whereby the lease may be taken into execution, would be good, Doe *v.* Carter, *ubi sup.* Conditions restraining assignment or under-letting, appear to be entirely abrogated where an assignment takes place by commissioners of bankrupt, or the sheriff under an execution, and the future assignees are not bound by them; and in the former case the lessee himself becoming bankrupt, and coming in afterwards as assignee, is by the stat. 49 *Geo.* 3. *c.* 121. *s.* 19. discharged from a covenant restraining alienation, Doe *v.* Smith, 5 *Taunt.* 795, and Doe *v.* Bevan, *ubi sup.* Such conditions also, so far at least as respects the restraint on alienation, are entirely got rid of, where consent has been once given to an assignment; and they do not in such case extend to the assignee, although the licence be confined to authorize assignment to a particular individual only, *Dumpor's Ca.* 4 *Co.* 119, and Brummell *v.* Macpherson, 14 *Ves. J.* 173. But in order that consent may entirely discharge the condition,, the consent or licence must be given conformably to the terms of the condition; and if it be required to be in writing, a parol licence will not prevent the future operation of the condition; and a dispensation with

Cooper v. Wyat, 5 *Madd.* 490.

Et vide 1 *Swan.* 481.

Flood v. Findlay, 2 *Ball & Bea.* 9.

Weatherall v. Geering, 12 *Ves.* 505.

And as a lessee may grant over his *whole term*, so he may make an under-lease of *a part* of his interest. As if he have a term of ten years, he may under-let for five; and the distinction between an assignment and an underlease is where the lessee parts with his *whole* interest, and where *not*; in the latter case it is an *under-lease*, in the *former* an *assignment*.* In an as-

Palmer v. Edwards, 1 *Doug*. 187. n.

the forfeiture for a breach of the condition does not take away the right of entry for a subsequent breach. Roe *v.* Harrison, *ubi supra*, Macher *v.* The Foundling Hospital, 1 *Ves.* and *Bea.* 191. and Doe *v.* Bliss, 4 *Taunt.* 735. And as terms of years may be made voidable by a defeasance made at any time after their creation, *Shep. Touch.* 396, and 398, that mode may be adopted to restrain future alienation without consent, where the original condition is discharged by giving a licence to assign; and on the assignment a defeasance may be made to determine the estate on alienation by the assignee, without the previous consent of the lessor. Such defeasance must be made by deed, and must be with the consent of all those who were parties to the creation of the estate, or, it is presumed, in whom the respective estates and interests of such parties are vested at the time of making the defeasance. *Shep. Touch.* 396.

See also Fryett *v.* Jefferys, 1 *Esp.* 392. Doe *v.* Ekins, *Ryan and Moo.* 29.

* But, a departure with the whole term, by way of underlease, would probably be supported as such, when that construction would save a forfeiture; as in the case where the original lease has a condition restraining assignment, but not under-letting; and also where the conveyance would be inoperative as an assignment; as, for instance, where the residue of the original term is three years or less, and the grant of such residue, by way of underlease, is by parol; in which case, by the second section of the statute of Frauds (29 Car. 2. c. 3.) it would be good as an underlease,

1 *Doug.* 187. n. 1 *East.* 502. 1 *T. R.* 441. 1 *Ld. Raym.* 99.

signment the operative words are, "assigned, transferred, and set over;" and in an underlease, the same words are used as in the original one.

Touchst. 300. ch. 17. 2 *Bl. Com.* 326. *Co. Litt.* 337 b. 338. on sect. 636. & Butl. N. (1)

On the entry of the lessee, he may surrender to his lessor, either by a surrender in deed or in law. On a surrender in deed, the operative words are, "doth surrender, yield up, and for ever quit claim;" [but it is the general practice, and is always proper to use also words of assignment, in order that the term may pass by the deed, should there be any thing to prevent its taking effect as a surrender.] and to such surrender it is advisable to make the lessor a party, and that he execute the deed, that his assent may be apparent. A surrender in law is, as before observed, the acceptance of another lease incompatible with the first.

Turner *v.* Richardson, 7 *East.* 336.

Touchst. 301.

But if a lessee for twenty years under lease for ten years, he cannot, by surrendering up his original lease, destroy the underlease for ten years, as it would be manifestly unjust that he should frustrate his own grants.*

but, by the third section of that statute, bad as an assignment.—See Poultney *v.* Holmes, 1 *Str.* 405.

* If however the original lease be rendered void, in consequence of a breach of a condition annexed to such lease by the parties to it, or if such lease be defeated by an entry of the lessor on account of the breach of such a condition,

By the statute of Frauds (29 Car. 2. c. 3.) no such term (except it does not exceed three years from the making of it, and whereon the rent reserved shall amount to two-thirds at least, of the full improved [annual] value of the thing demised) shall be created, assigned, granted, or surrendered, unless by deed or note in writing, signed by the party, or his agent authorized by writing, or by act or operation of law.

An estate for years may be *devised*, or limited *by way of trust*, to one for life,—and after his decease to another; or to a person *and the heirs of his body:* and the person taking the preceding limitation for years or life cannot defeat the limitation over; but the whole property in the term will vest *absolutely* in the person who takes under that limitation; which, if it were of freehold property, would give an estate tail, without any act done by him; and the limitations over will be effectually defeated.

Harg. n. (5.) to *Co. Litt.* 20 a. *Fearne's Cont. Rem. and Exec. Dev.* 6th ed. 401, 421.

See Doe *v.* Lyde, 1 *T. R.* 596. *Fearne, Cont. Rem.* 6th ed. 461.

But no limitations are allowed of terms of years which would render them unalienable beyond a life or lives in being, and twenty-one years afterwards.

Ib. 429, 435, &c.

the under lease will also be defeated, and will not prevent the original lessor from recovering the estate; otherwise the original lessee might by under-letting deprive his lessor of the benefit of the conditions on which he had demised the estate.

Lyon *v.* Mitchell, 1 *Madd.* 467. Britton *v.* Twining, 3 *Meriv.* 176.

What Mr. *Watkins* has stated in the two last paragraphs of the text is applicable to all personal property, as well as terms for years, and has in a great measure assimilated personal estate, for all the purposes of family arrangement, to estates of inheritance in real property, since the former may now, through the medium of trusts, or by way of executory devise, be limited, or given in succession, nearly to the same extent, where the duration of the estate or interest will admit of it, as the latter. When terms for years, or other personal estate, are bequeathed to a person for life, with a limitation over, the person entitled under the limitation over takes by way of executory devise, see 1st resolution in Manning's *Ca.* 8. *Co.* 95. and *Fearne's Cont. Rem.* and *Exec. Dev.* 6th ed. 404. In the case of terms for years, when not vested in trustees, the person entitled for life is at law considered as having the whole term vested in him, Manning's *Ca.* ubi sup. and Lampet's *Ca.* 10 *Co.* 46 b.; and during the continuance of the life interest, the person entitled under the limitation over has only a possibility and no actual estate. His interest may however be considered as a legal right, since on the death of the *quasi* tenant for life it confers of itself a title of entry, without requiring to be then clothed with any further legal property, and the term then vests in him without further act, see Lampet's *Ca.* ubi sup. and Paramour *v.* Yardley, *Plow.* 539. and Adams *v.* Pierce, 3 *P. Wms.* 12. He cannot, during the life interest, transfer at law his interest in remainder to another person; but he may devise it, and his assignment of it will be good in equity. *Fearne's Cont. Rem.* and *Exec. Dev.* 548. He may also release it to the person entitled for life, *Lampet's Ca. ubi. sup.*, and his grant of it to such person would, it seems, operate to extinguish it, *Ib.* 7th Quest. And he may during the life-interest release to the reversioner, Johnson *v.* Trumper, *Sir W. Jones*, 389, and a surrender to the reversioner would now probably be held to operate as a release. The assignment or grant also of the persons entitled for life, and under

the limitation over to a third person, would pass the whole term absolutely, and be held to operate as the grant or assignment of the former, and a release or confirmation by the latter, Lampet's *Ca.* 10 *Co.* 49.

The proposition stated by Mr. *Watkins*, in the text, tha the whole property in the term will vest absolutely in any person who is made *quasi* tenant in tail of such term, is to be understood with the qualification, that there is no condition attached to the limitation to determine it within the limits mentioned by him in the last paragraph; for a limitation over in the event of the *quasi* tenant in tail, (being a child of some person in being at the time of the settlement,) dying under the age of 21 years without leaving issue at his decease, would be good. And a proviso to that effect is now always introduced in well drawn settlements, comprising leaseholds, and in powers of sale and exchange, where they include those estates in their object. Without such a provision the leasehold estates would be withdrawn from the settlement as soon as any *quasi* tenant ir tail became entitled to them, for such person could bequeath them, after the age of fourteen years if a male, and after the age of twelve years if a female; and without any bequest they would on the death of the *quasi* tenant in tail vest absolutely in his or her personal representatives; but by the provision they are rendered inalienable, and follow the limitations of the settlement, until some person who is *quasi* tenant in tail attains the age of twenty-one years, when such person would also have the power of barring an entail in freehold property.

From this chapter the student will have observed that an estate for years confers a title to the possession of the land, as distinguished from and without disturbing or interfering with the seisin or freehold. The estate, when intended immediately to take effect in possession, or when the period arrives at which it is intended to have such effect, entitles the termor, during the subsistence of the term, to the possession of the land against the freeholder and all persons

claiming under him subsequently to the creation of the term; and as we have already stated it cannot, when its commencement is confined within proper limits, be barred while it remains an *interesse termini*, except in the instances that have been mentioned. But this possession of the termor is in law considered as the possession of the freeholder: and though the former should, from the nature and duration of his estate be entitled to the whole profits of the land, for one thousand or any other number of years, without payment of any rent to the freeholder, yet the title and seisin of the latter still subsists, with the privileges which the law has annexed to an estate of freehold, but subject to the qualifications required by law, where any beneficial interest must be connected with such estate, for the exercise of any peculiar privilege by the freeholder, as in the case of voting for members of parliament, &c. From these qualities arise the practical use and importance of terms of years in the modern system of conveyancing. They were originally intended merely for the benefit of the occupant, by giving him an interest not depending upon the will of the freeholder, but at the same time not interfering with the relation of the latter as tenant to the lord. And the interest being then created for short periods only, and for the sole purpose of husbandry, an occupation which, when the feudal system was in full vigour, was not thought sufficiently honourable to confer any dignity on those who followed it, the law then afforded little protection to such a species of property. When however the growth of commerce led men to consider property, more with reference to its beneficial value, than the dignity arising from the nature of the tenure, estates for years soon received the same protection as other estates. It was then discovered that, besides answering the purposes of short leases, they might from the peculiar nature of them, when extended in duration, be applied with advantage, for inducing persons to improve estates by building or otherwise, and also in mortgage transactions, and in the settlement and complicated arrange-

ment of real property, which became necessary in the advancing state of civilization. Thus the creation of estates for long terms was introduced; and through them a facility was obtained for charging settled estates, and raising sums of money for any particular purpose without disturbing the successive limitations of the freehold and inheritance, which could not in many cases be otherwise accomplished, except by the means of vesting the legal estate in trustees. The creation of terms of years, in wills and settlements, for raising money for payment of debts, or any charge affecting the estate, for securing rent charges and jointures, for raising portions for younger children, or daughters, or any sum of money for the benefit of a person having no estate, or only a particular estate, in the property; are instances of the advantage with which they are applied in this respect.

Terms of years attendant upon the inheritance. Butler's Notes to *Co. Litt.* 290 *b. n.* 249. s. 13. 1 *Sanders* on Uses & Trusts, 3d ed. 228. 1 *Cruise's Dig.* 2d ed. 499. *Sugd. Vend. & Purch. chap.* 9. s. 2 5th ed. 355. Willoughby *v.* Willoughby, 1 *T. R.* 763. Judgment of Lord Hardwicke in Hill *v.* Adams, Butler's Notes to *Co. Litt.* 208 *a. n.* 105. and Maundrell *v.* Maundrell, 7 *Ves. J.* 567, & 10 *Ib.* 246.

When long terms of years thus became in frequent use, an important consequence, beyond the immediate object of their creation, that of making them in certain cases attendant upon the freehold and inheritance of the estates in which they were raised, soon attached to them. It may be useful to the student to attempt an elucidation of the principles upon which this important branch of conveyancing is founded. It is peculiar to the system of real property established in this country, as it can only arise where there is a recognized distinction between the legal and equitable ownership of estates. If the courts of law took cognizance of equitable interests, there would be no necessity for preserving a distinction between such interests, and the legal estate; and, in fact, that distinction would then never have arisen, as the person beneficially entitled would have been regarded legally as the owner of the estate; and so soon as the object, for which any particular estate was created or conveyance made, was satisfied, or had failed, the estate or conveyance would have been held to have been at an end. When therefore, in mortgages, the money was paid, either at the time agreed upon or afterwards, or when the sum to be raised under the trusts of any term of years was discharged, or it

became unnecessary to raise it, by the failure of the object, the estate created for securing the money would have been considered as determined.* The division however of interests into legal and equitable, which the law of England recognizes, and the separation in a great measure of the tribunals which take cognizance of such interests, prevented this consequence from taking place as a general rule. The courts of law confining themselves to legal interests, and refusing to notice the mere equitable interest, consider the estate creating as still subsisting, unless a surrender or conveyance of it be made. Or at most they, in some instances, after a length of time, presume a surrender or conveyance to have been made at the period when, according to the equitable relation of the parties, it ought to have been done, if there be no circumstances to rebut such presumption. But they never raise such presumption against facts of a contrary nature. On these principles when a term of years is created for any purpose, such term is at law considered as a term in gross, and severed from the inheritance, even after the purposes for which it was created are completely satisfied, or have failed, unless a condition was annexed to it, on the creation, that it should determine on the satisfaction or failure of such purposes, and except in the cases where the circumstances afford ground for presuming the surrender of it. And the courts of law will not enter into the equity of any parties claiming against the termor, but consider him in right of his estate as the person legally entitled to the possession, leaving the equitable interests, where they exist, to the protection of the courts of equity.

Doe *v.* Sybourne, 7 *T. R.* 2.

Doe *v.* Scott, 11 *East.* 478.

It may be proper, perhaps, to inform the student, that an attempt was at one time made to break through these principles in some measure; and the courts of law began to allow persons claiming a title to the freehold to try their right in ejectment, notwithstanding the existence of a prior term, where such term was held in trust for the freeholder, or where the party claiming the freehold submitted to claim subject to the term. This, as the action of ejectment is

merely possessory, was in fact admitting the recognition of equitable interests in courts of law. See the cases of Lade v. Holford, *Buller's Law of N. Pr.* ed. 1775. p. 110, Goodright v. Sales, 2 *Wils.* 320, and Doe v. Pegge, 1 *T. R.* 758, n. (a). But these cases have since been over-ruled. See Doe v. Staple, 2 *T. R.* 696, where Lord Kenyon put the case of Lade v. Holford, on the ground only of a presumed surrender of the term, when of course it could no longer give a title to the possession. See also Goodtitle v. Jones, 7 *T. R.* 43, Doe v. Wharton and Dixon, 8 *T. R.* 2, and Doe v. Reade, *Ib.* 122. In the last case Lord Kenyon said that if it appears in a special verdict or case that the legal estate is outstanding, the person not clothed with the legal estate could not recover in a court of law; and that he could not in that respect distinguish between the case of an ejectment brought by a trustee against his *cestui que trust*, and one brought by any other person. And the doctrine established by these latter cases has since been invariably followed. See Doe v. Wroot, 5 *East.* 132, and Doe v. Scott, 11 *East.* 478. The courts of law have thus been brought back strictly to the recognition of legal interests only: when therefore, in a possessory action, a term is shown to be in existence, which has a preference to the title of the claimant, the courts of law will not enter upon the discussion of such title.

2 *Taunt.* 54. 2 *Barn. & Ald.* 723. 2 *Brod. & Bing.* 17.

But as in equity the freeholder, after the purposes for which the term was created were satisfied or had failed, was clearly entitled to have a surrender of the estate, those courts have always regarded the termor, after such period, as a trustee only for the freeholder. And it soon became necessary to settle how this beneficial interest of the freeholder in the term was to be considered. The courts of equity follow the rules of law in their construction of equitable interests; and, consequently, the beneficial interest in a term, where the person entitled to it has no higher interest in the estate, is treated as a chattel interest only, and is transmissible to the personal representatives in the same manner as the legal estate. In the case however in question,

it was evident that a distinction must be made: it was never the wish of the owner of the fee to create a distinct chattel interest, first for a particular object, and afterwards for the benefit of himself and his personal representatives, to the exclusion of his heirs; his intention was simply to raise the term for a particular purpose. From a regard, therefore, to this intention, and in order to preserve the higher and more important interest which the freeholder had as owner of the fee, which would have been materially infringed upon, by raising an equitable interest in him of a mere chattel nature for a long duration, the courts of equity held, that this beneficial interest of the freeholder in a term, whose purposes had been answered, should be subordinate to and merely attendant upon the higher estate of which he was seised or possessed. In fact, though the term is, as we have seen, kept distinct at law, yet in equity the beneficial interest is considered as completely consolidated with the freehold and inheritance, vested in the person entitled as *cestui que trust;* and therefore it follows the fee, in all the various modifications and charges to which it may be subjected by the acts of law or of the owner. The consequence is that this equitable interest in the term is not treated as a chattel: it will not be forfeited by the felony of the owner of the fee; Attorney-General *v.* Sandys, 3 *Cha. Rep.* 19, *Hard.* 498; it is not liable to his simple contract debts, Tiffin *v.* Tiffin, 1 *Vern.* 1: but is together with the fee real assets. It does not as against the heirs, or devisees, of the *cestui que trust,* or the assignees, in the case of bankruptcy, prevent the attachment of the title of dower, or curtesy, of the wife, or husband, of the person entitled as *cestui que trust,* Wray *v.* Williams, *Prec. in Chan.* 151, and 1 *P. Wms.* 137, Lord Dudley *v.* Dudley, *Prec. in Chan.* 241, Snell *v.* Clay, 2 *Vern.* 324, and see 2 *P. Wms.* 707; and Squire *v.* Compton, 9 *Vin. Ab.* 227, pl. 60; and if the inheritance escheat, the term will go with it, Thruxton *v.* Attorney-Gen. 1 *Vern.* 340.

When the courts of equity had thus settled the nature of the beneficial interest in terms attendant upon the inheritance, the advantage of preserving them, and assigning them from time to time, with an express declaration that they should be so attendant, became apparent. For the actual assignment and recognition of them as subsisting prevents the legal presumption of their having been surrendered; and the freeholder, through the medium of his trustee of the term, can in many instances carry back his title to the possession for a much longer period than he can shew a clear title to the inheritance. And should his latter title be found defective, or subject to any charge, yet his trustee, and consequently he, as *cestui que trust*, will, in right of the term, be legally entitled to the possession during its continuance, to the exclusion of all persons claiming any right to, or interest in, the land, in respect of any disposition, or charge, made subsequently to the creation of the term. This is the advantage which a purchaser or incumbrancer secures, by procuring an assignment of a term to a trustee in trust for hims lf.—He protects his estate from being defeated or injured, by prior titles and charges of which he is unacquainted, however valid they may be, see Goodtitle *v.* Jones, 7 *T. R.* 43, or by any subsequent disposition by the vendor or owner. By neglecting to take such assignment, he leaves himself exposed to the risk of some other person, whose title, or interest may even be acquired subsequently to his own, getting the benefit of the term, and using it to his detriment, see Goodtitle *v.* Morgan, 1 *T. R.* 755. Further, the courts of equity consider all persons acquiring any interest in an estate, who are clear of notice of any other title, (which point will be hereafter considered), as having an equal right to gain the benefit of an outstanding term for the protection of their interests, if they can obtain it: and every assignment diverts the term from its former channel, where it was attendant, perhaps, on an inheritance vested in some other person whose title could be enforced against the person in possession, or on the estates and interests of several persons

according to the priority of their respective titles and charges; and turns the whole benefit of it in favour only of a particular individual, and the inheritance he has acquired, whose title might, perhaps, independently of the term, be found to be the weakest, or altogether bad. Thus a person who has a defective title to the inheritance may, by means of a term, secure his possession of the estate; and this, as the term is in most cases of considerable length, is virtually securing the full benefit of the inheritance: for the courts of equity will not, where the person who has a defective title to the inheritance, and has also obtained the advantage of an attendant term, and is not affected by notice of the title, or charge, which, but for the term, would prevail against him, deprive such person of the advantage he has acquired, or abridge his estate or interest, to the mere beneficial interest in the term. On the contrary, they consider the term as attendant only on the freehold and inheritance which he has acquired, notwithstanding the existence in any other person of a better right or title to the inheritance, or to any charge upon, or particular estate or interest out of it. But the only persons that equity will allow to protect themselves by the assignment of an outstanding term, are purchasers for a valuable consideration, (in which description are included persons claiming under settlements made before, or in pursuance of articles entered into previously to marriage, and mortgagees, annuitants, &c.) and without notice, at the time of their purchase, of the intermediate estate, or incumbrance, against which they would protect themselves. Between such persons and those claiming against them, the equity is equal; that is, neither of them has any ground of preference to claim the protection or interference of a Court of Equity in his favour, against the legal title of the other of them; and wherever that is the case, the parties are left to their legal title, and whoever has the best will prevail. Two exceptions, however, exist to the rule respecting notice; *first*, in the case of Dower, against which a purchaser even *with* notice is allowed to protect himself, where he takes an actual assignment of a term, Radnor *v.*

Vandebendy, *Show. Ca. in Par.* 69. *and Prec. in Chan.* 65. Swannock *v.* Lifford, *Amb.* 6. *Butler's* notes to *Co. Litt.* 208 a. n. 105, and Maundrell *v.* Maundrell, *ubi supra;* and *secondly*, in the case of specialty debts to the crown, against which a term will not protect a purchaser even *without* notice of them, The King *v.* Smith, *Sugd. Vend and Purch.* App. No. xvi. It is further to be observed on the point of notice, that it is not necessary that a person should be unaffected with notice, when he procures the assignment of a term, if he were clear of notice at the time of his purchase or mortgage, or other charge; for in such case equity allows him to avail himself of any protection he can acquire against the defect of title, or charge, which he has subsequently discovered; and an outstanding term, or legal estate, is considered as *tabula in naufragio*, of which the first who possesses himself is allowed the full benefit.

As a term of years, which is attendant upon the inheritance, is thus considered part of it, whilst one which is in gross, both at law and in equity, is part of the personal estate only of the owner, it may be proper, and in practice is sometimes important, to ascertain in what instances a term will become attendant. This may be either by construction of law, or more correctly of equity, or by express declaration. When the same person is beneficially entitled both to the term and the fee, whether his interest in the former be equitable, and in the latter legal, or *vice versâ*, so that a merger would take place if the legal interests in both were united in him; or if such merger would not take place, on account of intervening legal estates, yet, if the same person be also beneficially entitled to such intermediate estates, or if they were created by such person, or raised only for securing mortgages, or other charges, the term is in such cases, attendant upon the inheritance by necessary implication of law. Whether a term can be made attendant by express declaration, where it would not be so without, is a point on which there is a considerable difference of opinion, see Scott *v.* Fenhouillet, 1 *Bro. C. C.* 68. *Sanders on Uses and Trusts,*

3d ed. 230., and *Sugd. Vend. and Purch.* 5th ed. 382., and an opinion of Mr. *Fearne,* in 2 *Col. Jur.* 297. It should seem, however, to be the better opinion, that where a person is entitled to the beneficial enjoyment of an estate in right of a term only, and such person, although owner of the inheritance, has no title, as such owner, to claim a preference to the acquisition of the term, and there is also an actual beneficial interest in the estate immediately reversionary to the term in another person, over which the person, entitled to the inheritance, has not, in right of the inheritance, any control; in such case, although the person entitled to the term, and the possession in right of it, may also have the inheritance, yet he cannot even by express declaration make the term attendant upon the inheritance. For if he could, it would be taking advantage of a rule of equity, to alter the nature of property, and to convert a chattel interest into a freehold one. From what has been said, the student will observe that where a termor purchases the freehold and inheritance, and takes a conveyance of the fee in the name of a trustee, the term in himself will, by construction of law, be attendant upon his equitable fee simple; and it is the practice to require the assignment of such terms as being attendant. There is, however, this difference between them and other attendant terms, that they are assets in the personal representatives of the owner of the estate, for the payment of his simple contract debts, see Dowse *v.* Percival, 1 *Vern.* 104. and Thruxton *v.* Attorney-General, *Ib.* 341. This followed as a legal consequence, and there was no ground for equity to interfere against the creditors: in other respects they are assimilated to attendant terms vested in trustees.

The student will, it is hoped, from the preceding observations, be enabled to trace the general outlines of the doctrine of attendant terms, and the principles which govern it. The importance of that doctrine in practice, and the difficulty of explaining it concisely in a familiar manner, must be the apology for the length to which the observations have ex-

tended. Too much pains cannot be bestowed in order to acquire a complete knowledge of the subject; and the student should pursue it in the several works and cases referred to in the margin, and in the cases which have been cited in the course of these remarks. An attentive perusal of them will more fully convince him of the utility of assigning terms as a protection, and the danger of leaving them outstanding. Of the former, the case of Goodtitle *v.* Jones, 7 *T. R.* 43, before cited, is as strong an instance as can well arise; and Goodtitle *v.* Morgan, 1 *Ib.* 755, which has been also already referred to, is a striking example of the latter.

In practice it is now the general rule for a purchaser, or mortgagee, to require an assignment, or surrender, of all terms which have been previously assigned to attend; and an assignment or surrender of any outstanding terms, even where they have never been so assigned, can rarely be safely dispensed with; for the doctrine of a presumed surrender is not to be relied on, and could never be maintained against an actual assignment procured by another person. It was formerly very usual to leave terms, which had been already assigned to attend, in the old trustees, and to rest satisfied with a general declaration, in the conveyance of the estate, that they should be held in trust for the purchaser, or mortgagee. This practice is not to be recommended, and is now seldom adopted. In Maundrell, *v.* Maundrell *ubi sup.* there was a general declaration of that nature: but it was decided that there must be an actual assignment to a trustee for the purchaser, to protect against a title of dower; and the principle of that decision seems equally applicable to the case of all charges and incumbrances. When there is a term sufficiently old, which can be shewn clearly to include the estase, and of which every step of the title can be easily proved, it is unnecessary to assign any others; and indeed more advisable to surrender them, to prevent the expense of preserving and procuring a person to assign them at a future period. But sometimes it is necessary to assign more than one term in the same estate, as it may be uncertain of which the owner could

Doe *v.* Hilder, 2 *Barn. & Ald.* 710, Emery *v.* Grocock, 6 *Madd.* 54, *Sugd. V. & P.* 392, 7th ed, 1 *Pow. Mortg.* 508, 5th ed, Gray *v.* Bond, 2 *Brod. & Bing.* 671.

avail himself. Now it is a rule of law, when two estates, which are immediately reversionary to each other, meet in the same person in one right, that the one which gives the title to the possession, except it is an estate tail, will, if it be less in quantity than the one in reversion, merge and become extinct in the latter. A term of years will therefore merge in an estate of freehold, or higher estate; and it has been further decided, that one term will merge in another which is immediately reversionary to it, Hughes *v.* Robotham, *Cro. Eliz.* 302. This merger will take place, although the term in reversion be for a less duration in point of time than the one which is entitled to the possession; for it does not depend upon one term being longer than the other, but on the relation which the two termors bear to each other, while the estates are kept distinct. In such case the person, who has the term which was first created, is, in right of it, entitled to the possession; and the person who has the term in reversion is entitled to the rents and services, where any are reserved, of the first termor, as holding a grant of the reversion, to which those rents and services were incident. The first termor is therefore in fact legally tenant to the other, and this tenancy equally subsists where there is not any rent payable. The consequence is, that the first termor can surrender to the second; and on such surrender his estate becomes extinguished in the portion of the reversion which is vested in the latter, whose estate then becomes an estate in possession. And where both the estates meet otherwise in the same person, in one right, the same effect follows by operation of law; and the term first created will merge in the reversionary one, in right of which alone the person will become entitled to the possession. To prevent this, which might be injurious to a title, in the case where a number of terms in the same estate are to be assigned, it is the practice to assign them alternately to two trustees: one trustee takes the 1st, 3rd, 5th, &c. according to the priority of creation; and the other trustee, the 2nd, 4th, 6th, &c. Thus none of the terms vested in either trustee are immediately

Stephens *v.* Bridges, 6 *Madd.* 66.

reversionary to any of the others vested in the same trustee, there being an intermediate term to each, vested in the other trustee, which, so long as all the terms are subsisting, prevents the merger of any of them; and by this plan two trustees are sufficient for any number of terms.

A plan has been proposed for rendering titles under attendant terms more simple, that the trustees of the several terms should make underleases, to the full extent of their respective terms, except a small reversion on each to one person, in trust for the purchaser, or other person, requiring the protection of the terms, and to attend the inheritance; leaving the reversion on each underlease outstanding in the original trustees, which would prevent the merger of the several derivative terms. This plan, if a purchaser would not require the assignment of the original terms, which are made merely reversionary on the underleases, secures, it is supposed, the benefit of all of them, at the expense only of preserving one trustee. The objection to it, which is admitted, is that a purchaser might require the assignment of the original terms; and it is submitted that he has a right to do so, and could not be advised to wave such right, whilst he is exposed to have it asserted against himself on a future occasion, when his expense would probably be considerably increased, by having left them outstanding. If, therefore, the original terms are to be assigned, no advantage can arise from the adoption of the plan. Another mode has been suggested, for simplifying titles under terms, on the plan of an underlease; which is, that one underlease should be made, derived out of all the terms, and the term so created be vested in a trustee to attend the inheritance; which new term, it is stated, will operate on each of the terms, giving the benefit of each of them, and be a lease, from the person who for the time being can confer the right to the possession, and a confirmation from the other lessors; and then that the several residues of the original terms should be assigned to another trustee; or, which is stated to be preferable, and equally safe, should be surrendered. If the original terms are to

2 *Preston's Treat. on Convey.* 127.

3 *Prest. Treat. on Convey.* 205.

be assigned, then, as there must be two trustees, we see no advantage to be derived from this plan, over that of assigning the original terms alternately, in the manner we have first mentioned; and the only benefit that appears is that of having one trustee instead of two, by surrendering the original terms. The objections, that we think the plan open to, apply equally, whether the original terms are assigned, or surrendered. First, we conceive the proposition questionable, that a term, created by way of underlease, secures, in all cases, to the lessee, the benefit of all the terms out of which it is derived. It is true, that a term granted by a tenant for life, and the reversioner in fee simple, will give the termor the full benefit of his term; first, out of the estate for life, and afterwards, out of the reversion. In this case, however, the derivative estate is less in quantity than the estates out of which it is created; and there is a reversion left both in the tenant for life, and reversioner in fee. But in an underlease granted by a termor, the derivative estate is equal in quantity, or degree of estate, with the estate out of which it is created; and a reversion can be preserved, only by making the derivative estate for a period less in duration than the residue of the original term: for if the whole time of that term be parted with, though by way of underlease according to the form of the deed, yet it is in construction of law an assignment of the original term, and not an underlease derived out of it. It is on this principle we think the proposition above-mentioned doubtful in its application to the case of attendant terms. Those terms are usually concurrent with each other, and operate after the first, as successive grants of the reversion. Now, to illustrate the point in question, we will suppose that several terms are outstanding, of the description we have mentioned, differing in duration, but of which the last, in point of creation, extends beyond all the others, by any given portion of time; and all the termors join in an underlease to one person, for a term which shall embrace the whole period of the residue of all the terms, except the last,

Scot v. Fenhoulet, 1 *Bro. C. C.* 68.

of which a small reversion is left. In this case, as the underlease includes the whole time of all the terms, except the last, it will, it is presumed, operate as an assignment of all those terms, and consequently produce a merger of such of them as are immediately reversionary to each other, in the same manner as if they had been assigned to one trustee. Further, so far as the underlease takes effect out of the term which was created last, it will, it is conceived, be a grant out of such term; and the term created by such grant, being immediately reversionary to all the others, which had been assigned by the operation of the underlease, will merge those terms, so that in fact the underlease will operate solely out of the last term, instead of giving the benefit of the former ones; and has nearly the same effect as if all the terms had been assigned to one trustee. For if all the termors, except the last, assigned their several terms to one person, and then the last termor made a grant out of his term to the assignee, this, if the terms will merge at all in each other, would merge all the prior terms; and the operation of the underlease, as it has the same effect, must, on the same principle, produce the same consequence. When the term of which the residue is the longest, is not the last in point of creation; still the same consequences will, it is presumed, partially follow, if the underlease comprises any portion of the time by which such term exceeds the others, as it will be an assignment of all the terms of which, it includes the whole period of the residue, and a grant out of the one of which any reversion is left. Another objection to which we think the plan of underleases is exposed, which applies generally to every plan of that nature, is, that an underlease, which takes effect, strictly as a lease, out of the term entitled to the possession, can operate only as a demise at common law, requiring the actual entry of the lessee to vest it as an estate, and before such entry conferring only an *interesse termini;* and we think it doubtful how far the entry of the freeholder, the *cestui que trust*, would, in a court of law, be considered as the entry of his trustee, having only an *interesse termini.*

We therefore think on the whole, that when several terms require to be assigned, the first mode we have mentioned, of assigning them alternately to two trustees, is the safest to be followed.

There are some incidents to an estate for years which have not been noticed. The lessée, where not restrained by covenants, or a reservation out of the demise, to the contrary, which is now usually the case, is entitled to *estovers*, i. e. to timber and wood, for fuel, and for the repairs of his dwelling, hedges, &c., and agricultural implements. And where the term is limited to determine on the happening of a collateral event, the lessee, or his personal representatives, are, when it so determines, entitled to emblements. With respect to waste, and forfeiture, the same doctrine is generally applicable to a tenant for years, as to a tenant for life, and for information on those points we refer to the Chapter "Estate for Life."

Davis *v.* Duke of Marlboro., 2 *Swan* 144.

CHAP. III.

OF AN ESTATE OF FREEHOLD.

ESTATES *at will* and *for years* are considered by the law as only *chattel* interests. An estate for *one's own life*, or the *life of another person*, or any *greater* estate, is deemed an estate of *freehold*. In the tenant of the *latter* estate the feudal possession or seisin is vested; and the tenants of the *former* are regarded as only the bailiffs or farmers of their respective lessors.* 2 *Blackst. Com.* 104, &c. *Sulliv. Lect.* vi. 1 *Burr.* 107, &c. *Butl.* n. (1.) to *Co. Litt.* 206 b.

* This position hardly applies to the nature of chattel interests, in the present day.—It is drawn from the feudal law, under which estates for years were so little regarded, that if the tenant of the freehold permitted the freehold to be recovered in a feigned action, it operated as a good bar to all terms of years derived out of it, by reason that the recoveror came in by a title paramount to that of the lessor; nor could the termor for years falsify the recovery. This evil was remedied by the statutes of *Gloucester*, 6 *Edward* I. c. 11, and the 21 *Henry* VIII. c. 15, and the estate of termor for years is now as well protected by the law as that of the freeholder. The law, however, still considers the possession of the termor, as the possession of the freeholder, as has been already explained in the note on terms for years, *ante*, page 44, and therefore, if the ancestor die, leaving a chattel lease

Hence *livery of seisin** was given on the creation of an estate of *freehold*, though it could not be given on the creation of an estate at will or for years† only, as the person intended to hold at will, or for years, was not to be put into the *seisin*; for if livery *had been* given, a *freehold*, of necessity,‡ would have passed at common law.§ The tenant for life, or the immediate te-

outstanding, the entry of the heir is not necessary, for he is
Co. Litt. 15 a. in the actual seisin, before entry, or receipt of rent. And if, in the like case, there be issue of different venters, and after the death of the father, the eldest son die without entry, there will, nevertheless, be a sufficient seisin in him to constitute what the law calls a *possessio fratris*, and to prevent the issue of the half blood from succeeding to the estate. 7 Ter. Rep. 390. 8 Ter. Rep. 213.

* The necessity of an *actual* livery is now frequently obviated by conveyances under the statute of Uses. See Book II. c. 11, 12, and 13.—Note by Mr. WATKINS.

† But if the inheritance be by deed of Feoffment, limited to one for years, with remainder over for life, in tail, or in fee, in such case the livery of seisin must, *ex necessitate rei*, be made to the lessee for years. But the lessee must take care not to enter into possession before livery made; for afterwards the livery could not be made to him on the principle, says Lord Coke, "*quod semel meum est, amplius meum esse non potest.*" Litt. Sec. 60. Co. Litt. 19 b.

‡ But livery of seisin made "*secundam forman chartæ*" will restrain its operation to the estate contained in the deed. Thus, says Lord Coke, "If a man make a lease for years by deed, and deliver seisin according to the form and effect of the deed, yet the lessee hath but an estate for years, and the livery is void." Co. Litt. 18 b.

§ But since the Statute of Frauds, a freehold cannot pass without writing.—Note by Mr. WATKINS.

nant of the freehold, is to answer to the *præcipe* of strangers,* and to render to the lord the returns of the feud; and hence it is that an estate of freehold was not suffered to commence *in futoro*,† as there must have been such an immediate tenant in actual existence.‡

* And, therefore, he has a right to the possession of the title deeds, in order to enable him to defend his claim.—Note by Mr. WATKINS.

Webb v. Lymington, *Eden* 8, 1 *Dick*. 298, Roberts v. Roberts, 1 *Madd*. 230, Noel v. Ward, 1 *Madd. Rep*. 322.

† But at the present day a freehold may be limited in corporeal hereditaments, *in futuro*, by way of executory devise or future use, as will be explained hereafter; and in the mean time, the freehold will remain in the grantor, or the heir of the devisor, as the case may be. And with respect to incorporeal hereditaments granted *de novo*, such as rents, &c., a freehold may be limited to commence *in futuro*.

It may be further remarked, that an estate of freehold is, in the eye of the law, always considered as of greater interest than an estate for years, or chattel interest, and consequently if a term for ten thousand years, and an estate for life, unite in one and the same person, the term will merge in the freehold, unless there be an intervening estate to prevent the union of interests; and note, that on a devise of lands, the freehold is in the devisee before entry, and he may enter without the assent of the heir of the devisor, and maintain ejectment against him.

Co. Litt 46 a.

Co. Litt. 111 a

‡ In this Chapter *Mr. Watkins* has very briefly treated of the Estate of Freehold. We shall not apologize to our readers for the following remarks. The explanation rendered by Mr. Watkins, (after stating the duration,) of the nature of the estate is, that in the tenant of this estate the feudal possession of seisin is vested; and he must answer to the *præcipe* of strangers, and render to the lord the returns of the feud: an explanation strictly drawn from the principles of the feudal law. It is probably true, that under

that law, the freehold always denoted an estate *in possession*, in like manner as the term "freeholder" still does; for the word freehold appears originally to have comprised the whole fee, whatsoever its extent. And the freeholder represented the whole fee, insomuch that prior to the 32 *Henry* VIII. c. 31, if he permitted the freehold to be recovered against him in a fraudulent or covenous action, the remaindermen were utterly barred and without remedy. But, we apprehend, it is long since the term "Estate of Freehold" implied, or required, the actual possession of the land, although the learned author of the Commentaries, in explaining the meaning of the word freehold, Vol. II. p. 104, after citing *Britton*, cap, 32, and the *Doctor and Student*, B. 2. d. 22. says, "Such an estate therefore, *and no other*, as requires actual possession of the land, is, legally speaking, freehold." An estate of freehold, we submit, may, according to our modern ideas, be in possession, remainder, or reversion. For, as remarked by
1 *Burr* 108. *Lord Mansfield*, instead of (as formerly,) signifying the whole fee, it now denotes the *duration* of a man's estate or interest in the land, that is, instead of being applied, as formerly, to express the nature of the tenure, it is now applied to signify the duration or extent of the interest which the individual takes in the inheritance of the land. The inheritance may be split into numberless estates of freehold, instead of the freehold signifying, as formerly, the whole fee. In fact as observed by *Mr. Butler, Co. Litt.* 266. (*b*) note 1, the Estate of Freehold now implies the reverse of its former signification, for (standing alone, and without further explanation,) it denotes that the estate or interest in the land is not of inheritance: but an estate for life only. The freehold, or *liberum tenementum* of the feudal law, is hardly understood in modern times. In the learning of disseisins, in cases of writs of *præcipe quod reddat*, and in certain instances of release of right to the land, we still look, it is true, to the actual freeholder: but, for the great purposes of the feudal law, the consequences resulting from the feudal
1 *Burr* 108. seisin, or possession, are at an end. And *Lord Mansfield*

goes so far as to say, "that the statutes passed for the prevention of subinfeudations, and for the removal of restraints on alienation, together with the frequent releases of feudal services, the statutes of Uses and Wills, and the total abolition of all military tenures, have left us little but the name of freehold, without any precise knowledge of the thing originally intended by that sound." It is not our intent to enter into an explanation of the feudal system, nor of the means alluded to by *Lord Mansfield*, whereby that system was eventually destroyed. For this purpose, we must refer the student to the several excellent treatises on the subject.

A freehold interest, we conceive, may imply considerably more than a mere estate of freehold. It may, as opposed to copyhold, or chattel interests, comprise the whole fee, and be expressive of the whole estate created. But we wish to impress on the mind of the student, that an estate of freehold is not now necessarily an estate in possession, and that, correctly speaking, standing (as we have said) alone, and unassisted by other expressions, it denotes that the estate or interest in question is not of inheritance, but for life only; and that where a greater estate is intended to be expressed, it is now more accurate to say "freehold and inheritance."

An estate of freehold, therefore, may be defined to be "an estate in possession, remainder, or reversion, in corporeal or incorporeal hereditaments, held for life, or for some uncertain interest created by will, or by some mode of conveyance capable of transferring an estate of freehold, which may last the life of the devisee, or grantee, or of some other person." It may, however, be necessary to remind the student, there are certain interests in land, which although of uncertain duration, and therefore in that respect participating of the nature of freehold, are nevertheless chattels. These are interests created by the statute law; and are securities for the payment of debts, namely, estates by statute Merchant, statute Staple, and by *Elegit*, *Co Litt.* 42 a. the possessors of which are said to hold their lands "*as freehold*:" but whose interests are really chattel.

Carter v. Barnardiston, 1 *P. W.* 509. Hitchins v. Hitchins, 2 *Vern.* 404, *Co. Litt.* 42 b. *Dyer* 135.

There is also another exception to the rule, in the case of an indefinite devise of lands to executors or trustees for and until payment of debts which is also a chattel interest; and a grant of a presentation to an advowson is also, it seems, a chattel interest.

Co. Litt. 20 a.

A freehold interest may be had in offices relating to land, or exerciseable within particular districts; and these are within the statute *De Donis*, and may be entailed. *Lord Coke* mentions as instances the Marshall of England, one of the Chamberlains of the Exchequer, and offices of Forestership. See also 3 *Cruise's Digest*, 2d ed. Title *Offices*, p. 126.

Havergill v. Hare, *Cro. Jac.* 510.

An entry on land under powers of distress and entry, on a grant of an annuity in fee by a conveyance, operating under the statute of Uses, also gives a freehold interest, *viz.* a conditional inheritance determinable on payment of the rent; and until entry made, the right of entry is in the nature of a contingent or future use to arise on non-payment of the rent, and will pass with a grant of the rent.

CHAP. IV.

OF AN ESTATE *POUR AUTRE VIE.*

AN Estate *pour autre vie* is an estate of *freehold*, though it is the lowest or least estate of freehold which the law acknowledges.* An estate for the life of *another* is not so great as an estate for *one's* OWN LIFE.† If *A.* have an estate for his own life, with remainder to *B.* for the life of *B.*, *B.* is capable of taking a surrender from *A.*‡ A *præcipe quod reddat* will lie against

2 *Bl. Comm.* 120, 258. *Litt. b.* 1. s. 55, 57. & *Co. Litt.* 41. *b.* &c. 2 *Bac. Ab.* 561. 10 *Vin. Ab.* 296. 4 *Comyn's Dig.* 41. 1 *Cruise's Dig.* 2d ed. 124. *Co. Litt.* 41 b. 42 a.

* If tenant *pour autre vie* hold over after the death of *cestui que vie*, he will be tenant at sufferance, vide ante, p. 23,

† And, therefore, says Lord Coke (*Co. Litt.* 42 a.), "if a tenant in fee simple make a lease of lands to *B.*, and to hold to *B.* for term of life, without mentioning for whose life, it shall be deemed for the life of the lessee, for it shall be taken most strongly against the lessor.—But if tenant in tail make such a lease, without expressing for whose life, this shall be taken for the life of the lessor, on the principle that where the words of a deed may have a double intendment, and one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken."

‡ The effect of the surrender will be that the estate of *A.*

a tenant *pour autre vie;* for he, *being tenant of the freehold,* must answer to the claims of

will merge in that of *B.*, and *B.*'s estate be accelerated and brought into possession. And, therefore, if it be the wish of the parties that both estates should be kept on foot, *A.* must convey his interest to a trustee for *B.*, so that if *B.* shall die in *A.*'s lifetime, his representative may be entitled during the remainder of the life of *A.* But if it be the object of the parties to merge the estate of *A.*, care must be taken, there be no intervening estate in a third person between the estates of *A.* and *B.* (such as an estate in trustees to preserve contingent remainders or the like,) to prevent the operation of the surrender. It sometimes happens that on the marriage of a person entitled to an estate for life in remainder with powers of jointuring, and charging with portions *when in possession,* the tenant for life in possession is willing to concur in enabling the remainderman to exercise his powers forthwith; and for that purpose a lease is first granted to a trustee for the tenant for life; and then, in case of an intervening estate in trustees to preserve contingent remainders; the tenant for life conveys, or (if there is no such estate) surrenders his life estate to the remainderman, who thereupon assumes to exercise his powers. To the first of these plans Mr. Butler has objected in his note *Co. Litt.* 271 b., that if the words of the power are "when in possession under the limitations," the words of the power are not complied with, the party being in fact tenant *pour autre vie,* under the conveyance, and that if the words, "under the limitations," are not in the power, they ought to be implied, and consequently the power cannot be well exercised. But the other of the plans, when practicable, he seemed in the former editions of his Notes to consider free of objection; but, in his last edition, he has stated the point doubtfully. Mr. Sugden, in his Essay on Powers, page 220, argues strongly that even in the latter case the powers cannot be duly exercised, on the ground that the transaction is a

strangers; and hence such an estate cannot be created to commence *in futuro*. Vide preceding chapter, p. 61. *in notis.*

This estate, being an estate of freehold, must

fraud on the subsequent remainderman in the event of the death of the donee of the power in the lifetime of the tenant for life in possession; and, consequently, charging the estates with burthens, to which, without the assistance of the tenant for life in possession, they would not have been subject; and in the last edition of his Essay on Powers he has cited a case recently determined in the Court of King's Bench, Cox *v.* Day, 13 *East,* 118. which he seems to consider in support of his reasoning. This case shortly was— an estate was settled on father for life, with remainder to son for life, with power for the father during his life; and *after his decease* for the son to grant leases for twenty-one years in possession. The father conveyed his life estate to the son, reserving a rent. The son being in possession made a lease under the power of his father's lifetime, and the lease was held void. Now we beg to remark that although we consider there is much force in Mr. *Sugden's* argument against the validity of the exercise of the power on an actual surrender of the prior interest, yet we cannot think the case of Cox *v.* Day strengthens that argument, or is even in point. In the principal case the requisite of the power viz. being in possession, is complied with; and the ground of objection is fraud. But in Cox *v.* Day the terms of the power were not satisfied: and it was not on the part of the defendant argued that the son might make the lease by virtue of the power limited to himself under the settlement, but that he made it by virtue of the power limited to his father as the assignee of his father's estate, a position perfectly untenable. We have made this remark to shew that the question, whether the mode formerly approved by Mr. *Butler* of exercising the power is maintainable, or not, is as open to argument since as before the case of Cox *v.* Day.

be created by some mode of conveyance which will pass the freehold in possession;* and may be transferred, that is conveyed, during the lives of the *celles que vies*, by the common mode of conveying freeholds. It may also be surrendered to the immediate reversioner, [or remainderman,] though that reversioner, [or remainderman,] be only tenant for his own life, [as before observed.]

If an estate for the lives of *A.*, *B.*, and *C.*, had been conveyed to *D.* without more, and *D.* had died, living *celles que vies*, the person who first entered, might have enjoyed the lands during the lives of *A.*, *B.*, and *C.* But now, by the statutes of *Car.* II. and *Geo.* II. *D.* may dispose of the estate by his last will (to be executed according to the Statute of Frauds, it being an estate of freehold); or, if he die intestate, [and there be no special occupant named,] it shall go to his executors or administrators, and be distributed among the next of kin. †

29 *Car.* II. c. 3. s. 12 14 *Geo* II. c. 20. s. 9.

* This observation must of course be confined to those cases, in which an estate *pur autre vie* is intended to be created out of an estate *in possession*. For an estate *pur autre vie* may, like any other interest, be created out of an estate in remainder, or reversion, by way of grant only.

Occupancy.

† The estate by occupancy deserves consideration. By the common law, if lands had been limited to *A.* for the life of *B.*, and *A.* had died in *B.*'s lifetime, an estate arose by general occupancy; for as the lands could not go to the heir for want of words of inheritance, nor to the executor or ad-

But, though this be an estate of freehold, it may be limited to *D.*, his *executors and administrators*, as well as to *D.* and his *heirs*; for the successors of *D.* *take as special occupants*, and Carth. 376. Oldham v. Pickering. *Bull.* n. to *Co. Litt.* Index, tit. Dower.

ministrator in respect of the estate being freehold, there was no legal owner, and the law gave it to the first person who could enter; and, therefore, if such tenant *pur autre vie* had made a lease of the lands, and had died during the life of *cestui que vie*, the tenant in possession might have held the freehold *pur autre vie.* And so in case of a dispute between tenant for years and lessee at will, which of them should be general occupant, it was adjudged for the lessee at will. And the common law also held the general occupant was not subject to the debts of the grantee *pur autre vie.* If, however, the estate was limited to *A.*, and his heirs during the life of *B.*, and *A.* died in *B.*'s lifetime, the heir was held to be entitled, not as heir, although the estate is in some of the books inaptly called a descendible freehold, but as special occupant; and as he did not claim *as heir*, he was not subject to the specialty debts of his ancestor, and might plead *riens per descent.* And it was held generally that an estate *pur autre vie* was not devisable. It was also held that there could not be a general occupancy in incorporeal hereditaments, but they might be limited to the heir as special occupant, although in the case of *Ripley* v. *Waterworth*, hereafter mentioned, the Lord Chancellor is, by mistake, made to say, there could have been no special occupancy of an incorporeal hereditament, which is contrary to all the authorities. It seems, however, clear they could not be limited to executors, or administrators, as special occupants.

2 *Bac. Ab.* 564.

Cited 1 *Vern.* 233.

Raggett *v.* Clarke, 1 *Vern.* 233.

Per *Lord Kenyon*, in Atkinson *v.* Baker, 4 *Term. Rep.* 229.

2 *Roll. Ab.* 151. 2 *Bac. Ab.* 566.

Whether *corporeal* hereditaments could have been limited to executors or administrators as special occupants, has been doubted by high authority: see the observations of *Lord Redesdale*, in Campbell *v.* Sandys, 1 *Sch.* and *Leff.* 288. and see *Roll. Ab.* title Occupancy, G. 2. St. John's Col-

not by descent. And this mode of limitation is often preferable, as it frequently saves the

lege *v.* Fleming, 2 *Vern.* 320, *Comyn's Digest*, title Occupant, *Dyer* 328 b. Salter *v.* Butler, *Cro. Eliz.* 901, and Mr. *Hargrave's* note, *Co. Litt.* 41 b. That they might be limited, see *Lord Hardwicke's* opinion, in Westfaling *v.* Westfaling, 3 *Atk.* 460. Duke of Marlborough *v.* Lord Godolphin, 2 *Ves.* 61. Williams *v.* Jekyl, and Elliott *v.* Jekyl, 2 *Ves.* 681. See also *Roll Ab.* Occupancy, G. 2. and Duke of Devon *v.* Kinton, 2 *Vern.* 719; and see also an able note of Mr. *Sugden*, in his Treatise on Powers, page 161. The recent case of Ripley *v.* Waterworth has, it seems to us, decided the question in the affirmative; and, indeed, the weight of the older authorities is altogether in favour of the limitation.

To remedy the evils of occupancy the statute of the 29 of *Car.* II. *c.* 3. called the statute of Frauds and Perjuries enacted, that "an estate *pur autre vie* should be devisable by will, executed in the presence of three or more witnesses; and if no such devise was made, it should be chargeable in the hands of the heir, if it should come to him by special occupancy as assets by descent; and in case there should be no *special occupant*, it should go the *executors or administrators* of the party, that had the estate thereof, by virtue of the grant, and should be assets in their hands." It is remarkable, the statute does not refer to the executor or administrator as special occupant: nor did it declare, to whom the residue or surplus, which should remain in the hands of the executor or administrator *under the statute*, should belong. In the case of Oldham *v.* Pickering, 2 *Salk.* 464, *Carthew*, 376, the latter question arose. The grantee *pur autre vie*, died intestate, and there was no special occupant. The next of kin claimed the residue, as undisposed of personal estate: but the court determined, it was *not* distributable amongst the next of kin; for, notwithstanding the alteration by the statute, it remained freehold estate; and, in proof of it, it

premises or estate from the inconveniences of a minority.

was mentioned, the administrator must answer the *præcipe* of a stranger.

This was the occasion of the enactment of the 14 *Geo.* II. c. 20. s 9. which, after reciting the statute of *Car.* II. and that doubts had arisen, where no devise was made of such estates to whom the surplus, after the debts of such deceased owner thereof were fully satisfied, should belong, enacts, "that such estates *pur autre vie*, in case there "shall be no special occupant thereof, of which no devise "shall have been made, according to the said act, for pre-"vention of Frauds and Perjuries, or so much thereof as "shall not have been devised, shall go, be applied, and dis-"tributed in the same manner as the personal estate of the "*testator or intestate*." On a consideration of the wording of these statutes, it seems clear, from the circumstance of the statute of Frauds using the words "*executors* or administrators" in the declaration of the parties, to whom the estates should go, in the event of there being no devise according to that statute, and no special occupant, and of the statute of the 14 of *Geo.* II. providing, that in such event the surplus shall be distributed in the same manner, as the personal estate of the "*testator* or intestate," that both statutes contemplated the case of an intestacy of the leaseholds for lives, at the same time that there might be a valid disposition of the personal estate by will: but the latter statute omitted to provide in express terms for that event; or, in other words, to state whether the surplus should in such case go according to the personal estate disposed of by the will, or as undisposed of personal estate; nor was provision made for the surplus, which might be in the hands of an executor or administrator as special occupant. In the case of Ripley *v.* Waterworth, 7 *Ves. Jun.* 425. both points were considered. Lands had been limited to a man, his executors, administrators, and a-s 18 *Ves.* 273.

signs *pour autre vie:* he died, having published his will, (not attested according to the statute of Frauds) and appointed an executor, and made a residuary bequest of his personal estate. There were three distinct claimants, the heir at law, the residuary legatee, and the next of kin; and it should seem a claim was made on behalf of an administrator for his own benefit. For the heir at law it was urged, that it was real estate, *viz.* a descendible freehold, that it would not pass by an unattested will, and an executor could not at common law take as special occupant; and, therefore, the heir at law was entitled. For the residuary legatees and next of kin it was urged, that an executor *might* at common law take an estate *pour autre vie,* as special occupant; and that even prior to the statute of Frauds, it was assets in his hands; and that it would be strange if (the statute providing, where there is no special occupant, it shall go to the executor) it should not go to the executor, where it is expressly given to him; and that the executor would as special occupant take it as personal estate, chargeable with debts, and subject to application as personal estate, after debts paid.—The Lord Chancellor was of opinion, it could in no event go to the heir; that it did not belong to the administrator; and that, as between the next of kin and residuary legatee, the executor was in equity a trustee for those to whom the testator had given the personal estate by a will sufficient to pass personal estate, and therefore he must be considered as holding it for the residuary legatee. Lord Eldon compared the case with that of stock which, by the several acts creating it, is disposable by will attested by two witnesses: but which Lord Thurlow said, if not so bequeathed, yet devolving upon the executor, should devolve upon him in trust for those who are entitled to the personal estate. If the executor die intestate, the estate it seems will go to *his* administrator, and not to the administrator *de bonis non.* See Oldham *v.* Pickering, and Ripley *v.* Waterworth, *supra:* but it will be advisable to take out administration to both. In Atkinson *v.* Baker, 4 *Term Rep.* 229, a point

See the Duke of Devon. *v.* Kinton, *supra.*

Miller *v.* Harewood, 18 *Ves.* 273.

arose, to whom the estate *pour autre vie* would go if limited to a man, his *heirs, executors and administrators,* whether (in case of intestacy) to the heir, or administrators: and it was argued in favour of creditors generally, that the administrator was entitled; but the Court decided for the heir.

It has been already stated that an incorporeal hereditament could not at common law be limited to executors, or administrators, as special occupants.

A question has been raised since the statutes whether, if a *rent* be limited to a man, his *executors and administrators, pour autre vie,* and the grantee die, living the *cestui que vie,* and without having disposed of it in his lifetime, it is not determined, notwithstanding the statutes; and we certainly think it would be difficult to contend, the executor or administrator could, since the statutes, be better enabled to take the rent as special occupants, named in the deed, than before the statutes: for the statutes can hardly be considered as having the effect of enabling a grantor to create an estate of occupancy unknown at the common law. But then it is asked, why cannot the grantee devise it, or the executor, or administrator, in case of intestacy, take it by force of the statutes? And to that it is objected, the statutes were intended to apply to those estates only in which executors, or administrators (if named), might take as special occupants at common law, and consequently not to incorporeal hereditaments. To this latter objection is opposed the opinion of Lord Keeper *Harcourt,* as stated by Mr. *Cox,* in his note 3 *Peere Wms.* 265. viz. "that the statute is not only made to prevent the inconvenience of scrambling for estates, and getting the first possession after the death of the grantee; but likewise for preserving and continuing the estate during the life of the *cestui que vie:* and it is reasonable since the grantee might, by deed, have disposed of the rent during the life of the *cestui que vie,* that though by his dying without having made such disposition, in nicety of law the estate would have determined, yet, by the statute that interest which passed from the grantor ought

2 *Blackst. Com.* 20.

Harg. n. (5.) to Co. Litt. 20 a. Fearne's Cont. Rem. and Exec. Dev. 6th ed. 495, &c. 6 Durnf. and East, 289. Doe d. Blake v. Luxton. And there may be a possessio fratris and an executory devise of an occupancy, 1 Fox & Smith Rep. 4.

An estate *pour autre vie* may be limited over *by way of remainder*;* and in effect, *be entailed* [by any conveyance to uses, by way of trust, or by devise]. But those who have interests in the nature of an estate tail may bar their issue, and all remainders over, by alienation, without fine or recovery, as by lease and release, surrender, &c. † and the having issue is not es-

1 Rowe Rep. 446, et vide 1 Meriv. 654, and 3 Pr. Wms. 266. Kendall v. Mickfield, Barn. Ch. Ca. 49. And see 5 Geo. III. cap. 17. as to cases of tithes by ecclesiastical persons, &c. Saltern v. Saltern, 2 Atk. 376.

to be preserved, and shall go to the executors or administrators of the grantee during the life of the *cestui que vie*; and the statute in this case does not enlarge but preserve the estate of the grantee." And this we think the better opinion: but, to avoid the doubt, it is usual to limit the rent to the grantee, his executors, administrators, and assigns, for a certain number of years determinable on the death of the *cestui que vie*.

* And the remaindermen (if not barred) will take as special occupants. An estate *pour autre vie* may be also limited by way of executory devise, or future use: and it is argued by Mr. *Butler* in his note in the 6th edition of *Fearne's Contingent Remainders*, p. 500, that "although the executory devise, or future use, be limited to take effect at a period which exceeds the limit prescribed by law for the vesting of such estates; yet, (that if there be not a tenant right of renewal) it may be supported on the ground that the interest itself, in which it is created, does not exceed that boundary; and therefore it is not necessary to connect the continuance of the estate itself with the ulterior limitation, so as to make it part of the event on which the ulterior limitation is to arise." We need not remark that although this ingenious argument may, if necessary, be resorted to in support of a limitation, yet it cannot be relied on in practice.

Compare Sug. Gilb. U. 277. with 3 Meriv. 347.

† It was once doubted, whether tenant in tail of an estate *pour autre vie* could by any means bar the remainders over,

sential; as in the case of a conditional fee at common law.

Low *v.* Burron, 3 *Peere Wms.* 266. But it has been determined, as stated in the text, that any alienation by the tenant in tail will bar the remainders; and they will be also barred by the surrender by tenant in tail of the old lease and acceptance of a new one, although the trustees in whom the legal interest is vested do not concur; and even by articles in equity, 1 *Atk.* 525. In Doe *v.* Luxton, 6 *Term. Rep.* 293, Lord Kenyon expressed a strong opinion that such remainders over might also be barred by *will:* but the case did not call for a judicial decision; and Lord Redesdale in Campbell *v.* Sandys, 1 *Sch.* and *Lef.* 295, has expressed a contrary opinion.

Baker *v.* Bayley, 2 *Vern.* 224. Blake *v.* Blake, 3 *Peere Wms.* 10. Now exploded, Dillon *v* Dillon, 1 *Ball. & Bea.* 77. *Coop.* 185 *et vide* 2 *Eden.* 339.

It may be further remarked that tenant *pour autre vie* is entitled to emblements on the death of *cestui que vie, Co. Litt.* 55. b. And that although the estate be limited to the heir as special occupant, there is neither curtesy nor dower of it.

Co. Litt. 55. *b.*

With respect to forfeiture and waste, the acts of tenant *pour autre vie* are controlled by the same principles as those which apply to the acts of tenant for life; for a statement of which we beg leave to refer to the next Chapter.

CHAP. V.

OF AN ESTATE FOR LIFE.

Litt. s. 56, 57. *Co. Litt.* 41 b. 2 *Bl. Com.* 120. 1 *Rolle's Ab.* 843. 2 *Bac. Ab.* 558. 10 *Vin. Ab.* 287. 4 *Comyn's Dig.* 41. 1 *Cruise's Dig.* 2d ed. 113.

By an estate *for life*, generally, is understood an estate for one's own life, and not for the life of another.

Like that, however, it cannot be made to commence *in futuro*, it being an estate of *freehold*; and for the same reason, it must be created or transferred by livery of seisin, *(secundum formam Chartæ,)* lease and release, bargain and sale enrolled, or be surrendered to him in reversion.*

* We beg to refer the student to our notes in the preceding Chapter, "Estate of Freehold."

Lord Coke mentions (*Co. Litt.* 42 *a.*) several instances of interests of uncertain duration, the tenants of which may, in pleading, allege they are seised generally for the term of their lives, *viz.* an estate to a woman *dum sola fuit*, or *durante viduitate*, or *quamdiu se bene gesserit*, or to a man and woman during coverture, or so long as the grantee shall dwell in such a house, or so long as he pay ten pounds, or until he be promoted to a benefice; and another instance is also mentioned in the note 243. *Lib.* 1. *viz.* to *B.* till *A.* makes *I. S.* bailiff of his manor.

Mr. Watkins has not treated on the modes by which an estate for life may be destroyed in the lifetime of the tenant, nor on the incidents annexed to the estate for life. It will, therefore, be necessary to say a few words on these points.

An estate for life will be forfeited by any act which divests, or displaces the remainders, or reversion, as by feoffment, fine "*sur conuzance de droit come ceo, &c.*" by tenant in possession, or common recovery, or by an assertion of ownership on record, as by a fine "*sur conuzance de droit come ceo, &c.*" by tenant for life in remainder, or by the acknowledgment on record of the ownership in another, as by the acceptance of a fine "*sur conuzance de droit come ceo, &c.*" from a stranger. But if the person having an *immediate* estate of inheritance in remainder concur in the fine, or it seems if a person, having either an immediate, or remote estate of inheritance in remainder, concur in the common recovery; or if the tenant for life himself has a remote estate of inheritance in remainder, and suffer a common recovery, there will be no forfeiture, nor will there be a forfeiture in any case if the estate be equitable. And the forfeiture by fine also will be saved if the fine is in the concord confined to the life of tenant for life.

1 *Leo.* 40.
Co. Litt. 252.
Bredon's case, 1 *Co.* 76.
Smith *v.* Clifford, 1 *Term Rep.* 738.
Sed vide Pelham's case, 1 *Co.* 3.
Hunt *v.* Bourne 1 *Salk.* 340.

A conveyance by lease and release, bargain and sale inrolled, or covenant to stand seised, being what the law terms innocent conveyances, will work no forfeiture, although professing to carry the fee, for they pass no more than the releasor, bargainor, or covenantor, may lawfully part with, nor will a *grant* work a forfeiture. An estate for life may be also passed by fine "*sur concessit,*" which works no forfeiture. And it may be surrendered by fine "*sur conuzance de droit tantum.*" But, if tenant for life in possession levy a fine "*sur conuzance de droit come ceo, &c.*" to tenant for life in remainder, it is a forfeiture of both their estates.

Co. Litt. 233 b. Note 147.
Pigot *v.* Salsbury, 2 *Mod.* 109.
Smith *v.* Abell, 2 *Lev.* 202.

As incidents annexed to this estate, tenant for life may cut underwood, *Co. Litt.* 53 a. and work opens mines, and new shafts or pits to pursue the old veins. He may also work any mines lawfully opened by a preceding tenant in tail, al-

Co. Litt. 53 a.
Clavering *v.* Clavering, 2 *Peere Wms.* 388.

though subsequently to the settlement under which he claims. Co. Litt. 53 b. But if he open a new mine it is waste. He may also fell timber for repairs, but not otherwise; and if he sell the timber, and apply the money in repairs, it is waste. Ibid. He is entitled to reasonable estovers, *viz.* housebote, ploughbote, and haybote, without assignment, unless he is restrained by covenant or agreement: housebote is a sufficient allowance of wood to repair and burn in the house; ploughbote, sufficient wood for making and repairing instruments of husbandry; and haybote, for repairing fences, &c. 2 Comm. 35. He is bound to keep the buildings in repair, and to repair the banks and walls against the sea and rivers. Co. Litt. 53 b. And if he convert one species of land into another, it is waste, *Co. Litt.* 53 b. Ibid. And cutting down decayed timber is also waste. Perrott *v.* Perrott, 3 *Atk.* 95.

2 *Inst.* 300. By the common law no action for waste would lie against the grantee for life or years. But by the statutes of 52 *Hen.* III. *c.* 24., and 6 *Edw.* I. *c.* 5. full damages may be now recovered by the owner of the inheritance for waste committed; and the place wasted recovered. But no one is entitled to an action for waste, except the person who has the *immediate* estate of inheritance, or reversion, and to whose disherison the waste is committed; and if, therefore, there be an estate for life, interposed between the estate in possession, and the first estate of inheritance, and the tenant in possession commit waste, and die in the lifetime of the intermediate remainderman, the action for waste is lost for ever. Co. Litt. 53 b. But if the intermediate remainderman die, or surrender his estate, the action will lie: Moore 387. nor will an intervening estate for years prevent the remedy. Co. Litt. 54. 2 Inst. 301. But no one can maintain the action who had not an estate of inheritance at the time when the waste was committed. 2 Inst. 305.

The action for waste has now, however, given way to an action on the case in the nature of waste, which may be brought by any one in remainder, or reversion, for years, life, or inheritance: 3 Saunders, 252. and the Court of Chancery will grant an injunction on a bill by tenant for life in remainder; Perrott *v.* Perrott, *supra.* and if tenant in possession sever the timber from the inheritance,

the first person *in esse* having an estate of inheritance, may maintain trover, notwithstanding there are intermediate contingent estates; and the Court of Chancery will order timber to be felled, if for the benefit of the estate; and will also interfere to prevent collusion between the tenant for life and a remote remainderman to the injury of unborn children; and will interfere if the tenant for life has himself the next vested estate of inheritance.

Uvedale *v.* Uvedale, 2 *Roll. Ab.* 119. Whitfield *v.* Rewit, 2 *Pr. Wms.* 240, 3 *Pr. Wms.* 268. Garth *v.* Cotton, 1 *Ves.* 524. Williams *v.* Duke of Bolton, 3 *Pr. Wms.* 268. n.

Tenant for life without impeachment of waste may open mines and fell any timber on the estate, except ornamental timber, and convert it to his own use, and is entitled to the timber of building blown down, or to timber blown down on the estate; and may grant leases out of his interest, without impeachment of waste: but neither he nor his lessee must maliciously waste the estate by pulling down houses, &c. for if they do, the Court of Chancery will grant an injunction, and they are bound to keep the houses in repair.

Smyth *v.* Smyth, 2 *Swan.* 251. Lewis Bowles's case, 11 *Co.* 84. *W. Jones* 51. Vane *v.* Lord Barnard, 2 *Vern.* 738. Partenche *v.* Powlett, 2 *Atk.* 383, *Co. Litt.* 55.

Tenant for life, or his executors, and his under-tenants, are entitled to emblements, in all cases where his estate is determined by the act of God: but if it be determined by his own act, he will not be entitled to emblements; and it is doubtful whether, in such case, his under-tenants will be entitled to them.

Cru. Dig. 2d ed Vol. I. 118.

CHAP. VI.

OF AN ESTATE IN DOWER.

2 Bla. Com. 129. Litt. b. 1. c. 5. & the Commen. 1 Roll. Ab. 675. 2 Back. Ab. 356. 9 Vin. Ab. 210. 3 Comyn's Dig. 532, 1 Cru. Dig. 2d ed, 180.

DOWER is an estate *for life*, which the law gives the widow in the *third part* of the *lands and tenements* of which the husband was *solely seised*, *at any time during the coverture*, of an estate in *fee* or in *tail*, in *possession*,* and to

Co. Litt. 32 a. * The requisites to dower, says *Lord Coke*, are marriage seisin and death of the husband. The widow is entitled to dower of the corporeal and incorporeal hereditaments of Co. Litt. 31 a. which her husband dies seised, and a seisin *in law* is sufficient, for if land descend on the husband, and he die seised before actual entry, the widow shall be endowed: but a seisin there must be in deed or law during the coverture; and, therefore, she shall not be endowed of a remainder or rever- Co. Litt. 32 a sion expectant, on an estate of freehold granted before marriage: but she shall, if expectant on a term for years, and shall have a third part of the reversion and of the rent. Nor shall she be endowed of a mere right or possibility, nor of a Co. Litt. 31 b seisin for an instant, as if there were two joint tenants, and one make a feoffment in fee, *Co. Litt.* 31 b, nor of lands both given and taken in exchange, but she shall have her election; nor of *dos de dote*, that is, of lands which descend on the husband, and are assigned to his mother in dower, for the son's estate is defeated by the assignment, and he has but a

which estate in the lands and tenements *the issue of such widow might, by possibility, have inherited.**

This estate, though created by act of law, may be conveyed or prevented by the act of the party.

Before assignment † and actual entry, the free-

reversion expectant on a freehold: but if the son took as a purchaser, or his wife was first endowed, in either case the wife shall be endowed on the mother's death; and the rule of *dos de dote* will not apply, unless dower be actually assigned to the mother. The widow shall not be endowed of an estate of which her husband is mortgagee in fee, nor if he be an alien, nor if he be attained of Treason, 5 *Edward* VI. c. 11. But she shall not be barred, if he be attained of felony only, 1 *Edward* VI. c. 2. and her dower is not lost by a divorce *a mensâ et thoro* for adultery. But it is, if she quit her husband's house with the adulterer, unless the husband be reconciled; and the widow of an idiot, or one *non compos mentis*, is entitled to dower.

Hutchens v. Hutchens, 2 Vern. 403. Co. Litt. 31 a. Co. Litt. 32. b. Ibid. Co. Litt. 31 a. sed vide 1 ? Geo. II. c. 30.

* This must be attended to; for if lands be limited to a man and the heirs of his body by his then wife, and she die, leaving her husband, and he marry again, the second wife shall not be endowed, for her issue could not by possibility inherit. Litt. Sec 53.

† The widow's third must be *assigned*, for she cannot by the common law enter into her dower before assignment; and therefore if the heir refuse, she is driven to her writ of dower, and the sheriff must assign her dower by metes and bounds, unless the husband be seised as tenant in common, when she shall have a third part of the undivided part. If

Co. Litt. 32 b. Litt. S. 44.

hold is not in the widow; and, by consequence, the mode of passing her claim differs before and after entry.

Before entry she has only a *right*, which must be *conveyed* [*i. e.* extinguished] by *release*, and that to the *person in possession of the lands*, [or rather to the person having the freehold in possession of the lands,] as to him only a release of right can be made.—*After* entry, the possession or freehold of her third as in himself; and, consequently, the proper mode of conveyance *to the person immediately in reversion* will then be *a surrender;* and to *a stranger* it may be conveyed by feoffment, with livery (*secundum formam chartæ*,) lease and release, or bargain and sale enrolled, [or by any other mode of conveyance, by which a freehold may be transferred.]

1 *Cruise*, 179. 2 *Ibid.* 96. 237. *Pig. Rec.* 66. 123. 195, *Harg.* N. to *Co. Litt.* 121 a. *Plowd.* 514. Eare *v.* Snow.

During the life of her husband, the wife may pass, or rather bar, her right to dower, by fine or recovery; which are matters of record; and in the process of which she is secretly examined,

the inheritance be entire, and such of which an assignment of dower cannot be made, she shall have the third part of the profits, as of a fair, an office, &c. and the third presentation to an advowson. After an assignment made, the widow may enter, and she shall be *in* of the estate of her husband; and paramount all incumbrances, mortgagees, or leases made by him.

Co. Litt. 32 a.

to prevent or remove the suspicion of any compulsion in the husband.

And as a dower is claimable out of those lands and tenements of which the husband was seised AT ANY TIME DURING THE COVERTURE, the alienation of the husband alone after marriage will not bar her claim; and, therefore, it it necessary that care be taken in conveyances by a married man that the widow be effectually precluded from her dowry (if entitled) by her joining in levying a fine, or suffering a recovery, [in which she must be vouched.]

Again, as dower is only claimable in such lands and tenements of which the husband was *solely seised* during the coverture, in *fee simple* or *fee tail in possession*, several modes present themselves by which dower may be prevented or barred.

And in the first place, it is requisite to dower that the husband be *seised*; and, consequently, one mode of preventing dower is by creating *a trust*; for the courts of equity have not permitted the widow to claim dower of a trust estate.* 2 *Bro. C.C.* 630. Curtis *v.* Curtis. But see *ante, Introd.* p. xi. and 1 *Watk. Copyh.* 79.

* This is rather a singular decision of the courts of equity; prior to the statute of Uses, it seems there was neither dower nor curtesy of an use: trusts are now only what uses then were; and the courts of equity have allowed curtesy of a trust, but have excluded dower. There seems no sound

But this mode is objectionable, as it puts the legal freehold out of the husband.

Again, it is requisite to dower that the husband be *solely* seised; and, therefore, dower is sometimes barred by conveying the estate to *the husband and another person in joint tenancy;* in which case, as the husband was not *solely* but *jointly* seised, the dower does not attach [during the joint lives of the husband and his trustee].

But this mode is also objectionable; for if the stranger or trustee die during the life of the husband, the husband will become *solely* seised, and to the end of such conveyance be defeated; [unless the husband shall have already parted with the estate;] and if the trustee survive the husband, the legal estate will be outstanding.

A third requisite to dower is, that the husband must be seised of an estate in *fee simple or fee tail in* POSSESSION; and, therefore, a third mode is to put *the fee in remainder;* * as by limiting to the husband for life, with remainder to ano-

principle for the distinction: it has been generally disapproved; and we can only say, "*Ita lex est.*"

Cordal's case, *Cro. Eliz.* 316. Hooker *v.* Hooker, *Rep. tempt. Hardw.* 13.

* But to effect this, the intervening estate should be a vested estate of freehold; for neither a term for years, nor, it seems, a contingent estate of freehold, which never arises, and the possibility of which is determined by the death of the husband, will prevent the dower.

ther person during the life of the husband,* with remainder to the husband in fee or in tail. In this case the intervening estate to the other person prevents the remainder over from being executed in possesion in the husband; and he is only seised in *possession* of the estate for life.

So if the estate be limited to the husband and a stranger for life, in joint tenancy, with remainder to the husband in fee or in tail, the husband shall hold the estate for life in joint tenancy with the stranger; and the remainder will be only executed *sub modo*, and not in possession. But this manner of limiting the estate is objectionable, for the reasons before noticed.†

* It may, at first view, surprise the student that the limitation to the trustee during the life of the tenant for life, as proposed by Mr. Watkins, should consistently with the principle mentioned in the preceding note, have the effect of barring the wife's right of dower. *Primâ facie*, it seems little more than a mere possibility of an estate or right of entry: but the case of Dormor *v.* Parkhurst, 18 *Viner*, 413, decided that a similar limitation to trustees to preserve contingent remainders was a good vested estate of freehold, on the principle that on a grant for life the grantor has an interest remaining in him to enter on the estate in case of forfeiture; which interest, when conveyed to trustees, is a remainder or legal estate; and the case of Duncombe *v.* Duncombe, 3 *Lev.* 437, is in point, that under such a limitation as the present the dower is prevented.

† It will be observed, that the several modes before mentioned prevent the right of dower *from attaching:* but there is a mode of limitation (formerly in practice) by which the right

Butl. n. (1. to *Co. Litt.* 379 b. *Fearne's Cont. Rem. and Exec. Dev.* 6th ed. 347.

The best way is, therefore, to limit the estate *to such uses as the husband shall appoint*, which will give him the power over the whole fee; so that he may pass it to a purchaser without any fine or concurrence of the wife or others; and the purchaser, on the execution of the power, shall be *in* from the original conveyance, and so

to dower *attached* on the estate, subject (as it was apprehended) to be divested in the husband's lifetime. This was by limiting the estate to such uses as the husband should appoint, and in default thereof to him in fee; until the exercise of the power, the husband was actually seised of an estate in inheritance in possession, on which the right to dower attached. On the execution of the power, it was considered that as the appointee came in, as if named in the deed creating the power, as hereafter explained, he was in, paramount the right of dower in the wife, and consequently held the estate discharged of the dower. If the power was not exercised, and the husband died, leaving the wife, her dower took effect. On the efficacy of this mode of limitation, considerable doubts were, however, entertained, on the principle, that dower having attached, it could not be defeated by an act of the husband alone; and in Cox *v.* Chamberlain, 4 *Ves.* 637, Lord Alvanley inclined to favour the doubt. In Maundrell *v.* Maundrell, 7 *Ves. Jun.* 567, the Master of the Rolls held the power itself wholly nugatory, and nothing distinct or different from the fee. But on a rehearing before the present Lord Chancellor, 10 *Ves. Jun.* 246, he expressed a clear opinion that the power might subsist with the fee. But as he also held that the power was not in that particular case well exercised, the question whether an exercise of it would defeat the wife's dower was left undecided; and it has become the universal practice, we believe, in the case of such a limitation, to require a fine.

Now settled that it will, 5 *Burn. & Ald.* 561. But consider Moreton *v* Lees, *Sug. Pow.* 153, with 5 *Madd.* 318.

paramount the claims of the wife; *and, in default of execution, to the husband for life, with remainder to A. B. his executors and administrators, during the life of the husband, with remainder, to the husband in fee*,* so that the limit-

* The student will observe, that under the limitation of uses here recommended, the right of dower *never attaches;* and, therefore, whether the power was exercised or not, the widow's claim is equally precluded. But it may be then asked, what is the use of the power? Its object seems to be to meet the case of the trustee, not concurring in the subsequent conveyance; for as the appointee comes in above the limitations, they are all of them on the exercise of the power defeated as if they had never existed, and consequently no part of the legal estate is left outstanding. If the trustee should not concur, and there was no power of appointment, the purchaser would, under the conveyance, take a legal estate for the life of the grantor, and a trust estate in remainder for the life of the grantor, with a legal remainder in fee; and thus part of the legal estate (*viz.* the legal remainder in the trustee,) would be left outstanding. The power, therefore, is still inserted; and *ex abundanti cautelâ* it is customary, even where the trustee does concur, as well to exercise the power as to convey the interest. The student should, however, bear in mind, that an evil may at times arise from the exercise of the power; for covenants real will not run with the land, unless there be a privity of person, and a privity of estate: now the appointee comes in paramount the appointor, and consequently there is no privity of estate between them, and therefore a covenant entered into by the appointor will not run with the land, so as to bind his appointee, who will come in above him, and hold the land discharged of the covenant, which will be personally binding only on the appointor and his representatives. Such was the case of Roach *v.* Wadham, 6 *East*, 289. A., on the purchase of an estate, took a conveyance to uses

3 Pres. Abr. 241. Ath. Tou. 177 n. Sug. V. & P. 541.

ation over in fee will be *in remainder;* and by limiting the intermediate estate to the *executors and administrators* of *A. B.*, it will be more likely to prevent its vesting in a minor, in case *A. B.* die before the husband; and the estate to *A. B.* being only an estate *pour autre vie*, may, (not-

See *ante*, ch. 4. p. 65.

to bar dower, and covenanted that he, his heirs and assigns, would pay the vendor a certain rent. He afterwards sold to B., and appointed the use to him; and the court held B. was not bound as the assignee of A. to pay the rent, In a similar case it will be therefore advisable to insist on the purchaser taking a conveyance without a power of appointment, so that his covenants may run with the land, and bind his assignees. A difficulty may also on the same principle, we apprehend, occur in the covenants for the title; for, according to the modern practice of exercising the power of appointment and appointing to similar uses in bar of dower, there may be no actual conveyance of the ownership for a century; for the student must remember that, on the appointment of an use, the seisin is undisturbed, and remains in the original relessee or feoffee to uses, and each successive appointee comes in under the original seisin, so that there is no privity of estate between any of them, each set of covenants being personal between the covenanting parties, and not running with the land. This is a considerable inconvenience; and it may be worth the consideration of the profession, whether the evils which may attend the exercise of the power do not more than counterbalance any advantage which can be derived from it; and whether it might not be more advisable to omit the execution of the power, and to take in all cases a conveyance of the interest, even although so minute a part of the legal estate as that vested in the trustee to bar dower should be left outstanding. And where the concurrence of the trustee can be obtained, no advantage is gained by the appointment.

withstanding its being a *freehold*) with equal propriety be limited to *his executors and administrators* as to his *heirs*, as they will not take by descent, but as special occupants.

A woman may also be precluded from claiming her dower in any lands of which the intended husband shall be seised during the coverture, by accepting a jointure according to the statute of *Henry* VIII. So she shall be barred in equity by the acceptance of other considerations, such as do not fall within that statute, as a yearly sum of money, though not charged on any specific fund.*

Co. Litt. 36 a. & b 2 *Bl. Com.* 137, 1 *Atk.* 563. Hervey *v.* Hervey, n. (1) to *Co. Litt.* 36 b. and the books there referred to. Case of Drury *v.* Drury, 5 *Bro. Parl. Cas.* 570, 8 *Ves. Jun.* 545. Williams *v.* Chitty.

* A strict legal jointure is described by Lord Coke to require six things, *viz.* the provision for the wife must take effect in possession or profit immediately after the husband's death; it must be for the term of her own life or greater estate: it must be made to herself and no other for her; it must be made in satisfaction of the whole, and not of part, of her dower; it must be either expressed or averred to be in satisfaction of dower; and it may be made either before or after marriage: but if made after marriage, she may wave it, and claim her dower. If the jointure is made before marriage, the wife will be barred, whether adult or infant, even if she be not party to the deed of jointure. But Mr. Cruise conceives, *Dig.* 2d ed. Vol. I. p. 228. s. 39, that she or her guardian, (if under age,) must have notice of the jointure, or else she will have relief in equity. She may be also barred by a mere equitable jointure: but if she be an infant, the provision must be as certain as her dower; and she may be barred of dower by provision by the will of her husband, if the intent be expressed or clearly implied (but not other-

Co. Litt. 36 a.

Drury *v.* Drury *supra.* Carruthers *v.* Carruthers, 4 *B. C.* 500.

7 Ves. 567. and 10 Ib. 246. Maundrell v. Maundrell, Butler's notes to Co. Litt. 208 a.

If there be any existing term which was created before marriage, there shall, in certain cases, be a *cesset executio* during the term. But it is said

wise) and she elect to take it in lieu of dower. See Mr. Hargrave's note, *Co. Litt. Lib.* 1. n. 227.

By the statute of the 11 *Henry* VII. *c.* 20. women seised of estates tail of the gift of their husbands are prohibited from alienating their estates, after the death of their husbands, without the concurrence of the heirs next inheritable, or of the persons who next after the death of the wife should have an estate of inheritance in the premises. But it provides that a woman may, notwithstanding, part with the estate for her own life only. In relation to this statute, it has been determined, that if the estate be limited to the wife in fee, or in tail general, or if the remainder be limited to a stranger, and no inheritance be reserved to the husband, or his heirs; or if the lands be of copyhold tenure, 1 *Siderfin*, 41—73, the cases are not within the statute: a trust estate and equity of redemption are, however, both within it.

Dennis's case, *Dyer* 342. Hughes v. Clubb, *Com.* 370, Foster v. Pitfall, *Cro. Eliz.* 2. and see *Sugden's Note*, *Gilbert*, 243. Clifton v. Jackson, 2 *Vern* 489.

The seventh section of the statute of 27 *Hen.* VIII. *c.* 10. enacts, that if the wife be lawfully evicted from her jointure lands, she shall have her dower out of the remaining lands of her husband: and in reference to this enactment, Mr.
p. 317, 6th ed. Sugden seems to have fallen into a mistake, in his treatise on the Law of Vendors and Purchasers, which it may be important to explain. He first notices that some gentlemen require a fine on the purchase of lands where the wife had accepted an equitable jointure, which practice, he truly says, was discountenanced by the majority of the profession; and that it seems clear, if the wife should prosecute her writ of dower at law, equity would protect the purchaser, and condemn her in costs. He then remarks, that it was objected by the advocates for a fine, that if the fund on which the jointure was charged should be evicted from the jointress, she could claim her dower. And he adds, that this

that there must be an *actual assignment* of the term to protect a purchaser against the dower of

objection seems equally to apply to a legal jointure; and he states the seventh section of the statute as his authority. He then proceeds to notice that when his first edition was published, he was not aware of any case in which the doctrine had been expressly established. But he remarked, it was never attended to in practice; and he had never heard the objection taken, which made him apprehensive he had fallen into an error: the point could not, he thought, so long have escaped notice. But he concluded that, unless in the case of a legal jointure a purchaser could call for the title, he could not in the case of an equitable jointure; for equity would act in strict analogy to legal jointures. And he adds, that since the publication of his first edition he had met with Maunsfield's case, *Hargrave's notes* to *Co. Litt.* 33 a. n. 202., which had expressly decided, in the case of a legal jointure, that the wife evicted from her jointure lands was entitled to dower; and it was conceived that equity must in this respect follow the law; and the author's impression, therefore, was, that where an estate would be subject to the dower of the vendor's wife, if she were not barred by a jointure, whether legal or equitable, the vendor must either procure his wife to levy a fine of the estate at his own expense, or produce a satisfactory title to the jointure lands.

The opinion above hazarded has, we fear, led to much unnecessary expense; and has given foundation to a practice for calling for a fine, or the title to jointure lands in cases in which the demand could not be supported. The practice in the profession, prior to the remarks we are animadverting upon, was, that a distinction should be taken between the case of a provision made by the husband by force of the statute without the wife's concurrence, which would be strictly *ex provisione viri*, and which would preclude her from dower equally as if she had concurred: and the case

the widow of the vendor: for it is said also that a term, while outstanding, is as much attendant

of a provision made for her before marriage, with her consent, which, if she were adult, would arise *ex contractu:* and that, in the first instance, if she was evicted from her jointure lands, she would be entitled to dower by the provision of the statute: but that in the second instance the transaction was grounded on a valuable consideration, and that whilst the jointure existed she had no legal claim to dower; and, if she were evicted, a court of equity would enforce the contract, and protect the other estate of the husband from her legal claim, and that it was her duty before marriage to enquire into the title of her jointure lands.

We conceive this distinction to be sound; and it will account for that apparent want of precaution with which Mr. Sugden seems rather to charge the profession, when he says, he had never heard the objection taken, and he was apprehensive he had fallen into an error, which, it appears to us, he had. And we certainly think, that in all cases in which an adult, on her marriage, accepts a provision legal or equitable for her jointure, and in bar of dower, she will be precluded by her contract from claiming dower, even if she be evicted from her jointure, and that a purchaser has not in any such case a right to require either a fine or the production of the title to the jointure lands. Maunsfield's case, before alluded to, is briefly stated; and the circumstances under which the judgment was given are not recorded, and it is no authority on the precise point in question. The opinion of the late Vice-Chancellor, in Simpson v. Gutteridge, 1 *Mad. Rep.* 613. coincides with the observ-
Co. Litt. 36 b. ations we have made on this point. It may be added, that if the wife concur in a fine of her jointure lands, she will not be endowed of any of the other lands of her husband. But
Sidney v. Sidney, 3 *P. Wms.* 269. a jointress is not precluded from her jointure, or even relief in equity to enforce it, by adultery, or living apart with another.

in equity upon dower as upon the remaining interest in the inheritance.*

* As the husband, seised of an estate of which the wife would be dowable if she should survive him, cannot destroy her right to dower by his own act; so it seems to follow that, according to the doctrine in Maundrell *v.* Maundrell, he cannot, by his own act, cause the term to cease to be attendant upon dower. If the right of the wife to dower attaches upon *the freehold* in the lifetime of the husband, it must surely, according to Maundrell *v.* Maundrell, attach also upon the term *attendant upon such freehold;* as it is laid down in that case that the outstanding term "is *as much* attendant upon dower, as the remaining interest in the inheritance; and therefore ought not to be set up by the latter against the former." If the wife, therefore, cannot be deprived of the dower by the husband alone, it does not appear how she can be deprived by him alone of her right to *the attendance of a term* which is *as much* attendant upon *her* interest *as upon his own;* nor, consequently, how "an actual assignment" of such term can be properly made without her concurrence, or how that concurrence is to be legally given. *Note by Mr. Watkins.*

Notwithstanding the doubt here thrown out by Mr. Watkins, it has been decided beyond question, as we have already mentioned in page 50, that if the term is assigned to a trustee for the purchaser by the direction of the husband, the dower will be barred, although the purchaser has express notice of the marriage. But an actual assignment is necessary for that purpose, Maundrell *v.* Maundrell, *supra.* And it should seem the court will enforce specific performance against a purchaser from the husband, if there be an outstanding available term which can be assigned to a trustee for his protection, although the wife will not concur in a fine, 1 *Maddock* 613 and 618. But it may be observed, that it remains to be determined whether, if the trustee refuses to assign on express notice of the marriage given to him by the wife, a court

This point now stands for judgment before the Lord Chancellor in Mole *v.* Smith, 1 *Jac.& W.* 665.

of equity will compel him on a bill by the husband. We should apprehend it will.

We have further to remark, that tenant in dower is subject to action for waste and to forfeiture, *Co. Litt.* 53 (a) 54 (a) and her concurrence is requisite in making the tenant to the *præcipe* in a common recovery, for she is not within the 14 *Geo.* II. c. 20; and that by the custom of gavelkind she is entitled to a moiety of the land, instead of a third, so long as she continues a widow and chaste.

Rowe v. Power, 2 *New Rep.* 1. *Robinson's Gavelkind*, 159.

CHAP VII.

OF AN ESTATE BY THE CURTESY.

AN estate by the curtesy, like that in dower, arises by act of law, and is an estate *of freehold;* and consequently, as it may be conveyed to a stranger for the life of the tenant by the curtesy, it must be conveyed by those means which the law appropriates for the transfer of freeholds, as by livery, or under the statute of Uses. 2 *Bl. Com*.126. *Litt* b 1. c 4. and *Co. Litt.* 29 a. to 30 b 4 *Comyn's Dig*. 38. 7 *Vin. Ab.* 148. 2 *Bac. Ab* 218. 1 *Cruise's Dig.* 2d. ed. 138.

It may also be *surrendered* to the heir or reversioner.

As an husband shall have his curtesy of a trust, the same modes of prevention do not exist as exist with respect to dower. But as he shall not have his curtesy of a remainder or reversion *on a freehold*, nor of a freehold in possession, that is not also *of inheritance*, the estate by curtesy may be prevented by placing either the freehold in possesion, or an intermediate estate of freehold, or the inheritance, out of the wife.* Morgan *v* Morgan, 5 *Madd.* 408 Doe *v.* Rivers, 7 *T R*. 276.

* To give title to tenancy by the curtesy, the wife must be seized in fee simple, or fee tail, and issue must be born *Litt sect*. 35.

alive, *Co. Litt.* 30, which might by possibility have inherited, *Co. Litt.* 29 b.; and there must be an actual seisin in deed, a seisin in law not being sufficient, *Co. Litt.* 29 a. But it is immaterial at what time the issue is born, whether before or after the lands vest in the wife, or whether the issue be then alive or dead, *Co. Litt.* 30 a.; and the possession of a tenant for years will be the possession of the wife, so as to give a title to the curtesy before receipt of rent. Of an advowson, or rent, of which actual seisin cannot be obtained, there will be curtesy, although the wife die before avoidance or receipt, *Co. Litt.* 29 a. By custom of gavelkind the husband, if he survives his wife, is entitled to a moiety, whether he has issue or not, so long as he remains unmarried. Tenant by curtesy is subject to action for waste, and to forfeiture; and his concurrence, if seised of the freehold in possession, is requisite in making a tenant to the *præcipe*, as before remarked in the case of dower.

De Grey *v* Richardson, 3 *Atk.* 169.

Robinson's Gavelkind, 136.

TENANT IN TAIL AFTER POSSIBILITY OF ISSUE EXTINCT.

Mr. Watkins seems to have omitted all mention of this estate. It arises when lands are limited in special tail, and one of the parties from whom the issue are to proceed dies without issue; as if lands are limited to a man and woman, and the heirs of their two bodies, and one of them dies without issue, the survivor is tenant in tail after possibility of issue extinct: so if lands are limited to a man, and the heirs of his body by his then wife, and she die without issue, the husband is tenant in tail after possibility of issue extinct; and this estate may exist in remainder; and it will arise if there be issue born, and the issue die without issue. The estate must be created by the act of God, and not by limitation of the party. And so, if lands are given to a man and his wife, and the heirs of their two bodies, and afterwards they are divorced, *causâ consanguinitatis*, or *affinitatis*, their estate of inheritance is turned to a joint estate for life: but because their estate is altered by their own act, and not by the act of God, they are not tenants in tail after possibility of issue extinct, but merely tenants for life. So far as respects alienation, this tenant is reduced to an estate for life; for he has no power of barring the remainders or reversion on his estate. But he has several privileges which a mere tenant for life has not, the principal of which is, that he is dispunishable for waste: but, nevertheless, it is said in Herlakenden's case, 4 *Co.* 63., that if he fell the trees the lessor shall have them, for he has not an absolute interest in them. There seems to be no decision to support this doctrine; and it is difficult to conceive it to be law, or to understand why this tenant is to be in a worse situation than

Litt c. 3. s. 32 to 34, 2 *Bl. Comm.* 124. 4 *Comyn's Dig.* 38, 20 *Vin. Ab.* 171, 2 *Bac. Ab.* 554, 1 *Cruise's Dig.* 2d ed. 103.

Litt. s. 32. and 33.

Lewis Bowles's case, 11 *Co.* 84.

Litt. s. 32.

Co. Litt. 28 a.

Co. Litt. ibid.

tenant for life, without impeachment of waste, when the law professes to consider his interest as better than that of tenant for life; and it is denied to be law by Lord Coke, in 1 *Roll. Rep.* 184.

The privileges of this tenant are enjoyed in respect of the privity of estate and inheritance once in him; and, therefore, if he assign his estate to another, the privity is gone, and his grantee will be mere tenant *pur autre vie*, and it should seem be punishable for waste. *Lord Coke* mentions four qualities of this estate, in which it is similar to that of mere tenant for life:—1st, It is liable to forfeiture; 2dly, It will merge in an estate in fee or in tail; 3dly, He in reversion or in remainder shall be received upon his default; and, 4thly, An exchange between him and mere tenant for life is good.

Co. Litt. 28 a.

Ibid.

CHAP. VIII.

OF AN ETATE TAIL.

WHEN an estate is limited to a person and *his decendants*, it is called an *estate tail*, as to a man *or* woman, or to a man *and* woman,* and the heirs of *his*, *her*, or *their body or bodies*.

2 *Bl. Comm.* 110, *Litt.* b. 1. c. 2, *Wright's Ten.* 185, *Sulliv. Lect.* 121, *Watk.* No. lxxix. to *Gilb. Ten.* 418, and 1 *Watk. Cop.* ch. 4. p. 147, 4 *Comyn's Dig.* 6, 10 *Vin. Ab.* 245 and 20 *Ib.* 163, 2 *Bac Ab.* 538, 1 *Cruise's Dig.* 2d ed. 80.

If it be to a man *or* woman, and the heirs of his or her body, it is an estate in tail *general*, as any heir of his or her body may inherit: but if it be to Thomas and the heirs of his body *by his wife Jane*, or to Jane and the heirs of her body *by her husband Thomas*, or to Thomas *and* Jane and the heirs of *their bodies*, it is an estate in *special* tail; and so also if it be to the heirs *male* of the body of *A. B.* As, in the first case, no heirs of the body of Thomas can inherit but

* By this is to be understood a man and woman between whom in contemplation of law issue may be had; for if an estate be limited to a brother and sister, (for example,) and the heirs of their bodies, this will give them a joint estate for life, with several inheritances in tail as tenants in common, *Fearne Con. Rem.* 6th ed. 367.

those who are born of Jane; nor, in the second, any heirs of the body of Jane by any other husband than Thomas; nor, in the third, any heir of the body of Thomas who is not also heir of the body of Jane, nor of Jane who is not also the heir of the body of Thomas; or in other terms, no heir of the body of Thomas by any other wife, nor of Jane by any other husband, shall succeed.

Hence if it be wished to settle lands so that the entail may not be cut off by the parents, it may sometimes be necessary to limit an estate for life to one parent, and the inheritance to the heirs of the body of the other, as the entail would then be in neither;* the first taking only for life, and the other not taking at all; but the heirs being in by purchase. Or if the estate be the husband's, to limit to him for life, with remainder to the wife in tail, as he being

Hasker v. Sutton, 1 *Bing* 500.

* The limitation to the heirs of the body would, in this case, be contingent; and might be destroyed by the tortious act of the tenant for life, if there were no limitation to preserve contingent remainders: and, even if there were, it might fail of effect, in case the parent having the life estate should die before the parent to whose heirs the estate is limited, as there would after the decease of the tenant for life be no estate of freehold to support the contingent remainder unless the limitation to the trustees were extended to meet that event. It is a mode of limitation which can never be recommended.

tenant for life only, cannot dock the entail, and the wife is prevented from doing so by the statute of *Hen.* VII. *c.* 20.*

But as it is a rule,† that "if the ancestor, 1 *Co.* 104. *Watk. Desc.* 157. 1 *Harg. Law Tr.* 485. 550.

* But as the husband and wife may *together* bar the entail, this is not always an effectual mode of prevention.—Note by MR. WATKINS.

This mode of limitation should never be resorted to, unless it is wished to give the parents jointly a power of disposition over the estate; and even in such case, a joint power of appointment is more simple, and will prevent the expense of a fine or recovery, which will otherwise be necessary to bar the entail.

† This is the well known rule in Shelley's case, so called, *Rule in Shelley's case.* not because the rule was first propounded in that case, but because the rule determined the case. From an ignorance of the principle of this rule, more legal errors have probably arisen, and attended with greater mischief, than from the misapplication of any other rule in law. As Mr. Watkins has treated it very briefly, it becomes necessary for us to give some further explanation on the subject. The rule has its origin in feudal principles; and was most probably established to prevent injury to the lord, by loss of wardship, if the heirs could have been made to take by way of purchase, instead of by descent. The rule is, that wherever the ancestor takes an Estate of Freehold, and an immediate remainder is limited thereon in the same conveyance to his heirs general or heirs in tail, the remainder so limited is immediately executed in possession, in the ancestor so taking the freehold; and, therefore, is not contingent or in abeyance. And also wherever the ancestor by any gift or conveyance takes an estate of freehold, and there is afterwards, in the same gift or conveyance, a limitation to his right heirs or heirs in tail, after some other estate for life or in tail

by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an

interposed between his freehold and such limitation to his heirs, &c.; this remainder to his heirs vests in the ancestor as a remainder, and shall not be in contingency or abeyance. And even if the remainder cannot by possibility vest in the lifetime of the ancestor, as to A. and B. and the heirs of him who shall die first; or if the remainder be limited on a contingency, which contingency does not happen in the ancestor's lifetime, nevertheless, the heir will take by descent.

The general principles which seem to govern the application of the rule are as follow: *First*, both the limitations must be created by the same instrument, or by that which is tantamount thereto, *viz.* the estate of freehold by one instrument, and the remainder to the heirs by an exercise of a power of appointment contained in that instrument. *Secondly*, both estates must be legal, or both equitable. On this a doubt has been entertained, where the freehold in the ancestor is legal, and the remainder in the heirs equitable: but it should seem the estates will not, in such case, coalesce.

Thirdly, the rule will operate, although the estate of freehold be made without impeachment of waste, or with powers of jointuring or leasing, or there be an intermediate limitation to trustees to preserve contingent remainders. *Fourthly*, it will operate even if words of limitation be engrafted on the remainder to the heirs, not being inconsistent with the nature of the descent pointed out by the first words; or if the limitation be to the heirs special, with general words of inheritance engrafted thereon. *Fifthly*, if there are words of limitation engrafted on the remainder to the heirs, inconsistent with the nature of the descent pointed out, as to A. for life with remainder to his heirs, and their heirs female of
1 *Rep.* 95. b. their bodies, 1 *Rep.* 95b. or there be explanatory words added thereto, as "to B. and the heirs of his body (that is to say)

estate is limited, either mediately or immediately, to his or her heirs in fee or in tail, the words *the heirs* are words of limitation, and not words of purchase," care must be taken, if it be intended that the entail shall not vest in the parents, to limit the estates so as not to be capable of uniting; as to the parent for *years*, as for

to his first, second, and other sons,' or " to A. and the heirs male of her body begotten, or to be begotten, as tenants in common, and not as joint tenants; and if such issue should die before he, she, or they should attain twenty-one, then to B. in fee," Doe *v.* Goff, 11 *East* 668, or " to A. and after her decease to the heirs of her body, share and share alike, if more than one;" the heirs will take as purchasers. *Sixthly*, if the word " Heir" be used in the singular number, without any words of limitation thereon, the rule will take effect, unless, as in White *v.* Collins, *Com. Rep.* 289, the limitation to the heir be for life: but it seems if the limitation to the heir be in the singular number, with words of limitation thereon engrafted although consistent with the nature of the descent pointed out, yet the word *heir* has been deemed a word of purchase. *Seventhly*, the rule applies as well to trusts executed, as to legal estates. But, *Lastly*, in trusts executory the rule is relaxed; and the Court of Chancery will direct a settlement on the issue, as purchasers, if such be the evident intent of the parties. This latter observation applies chiefly to the case of marriage articles. See Trevor *v.* Trevor, 1 *Eq. Ab.* 387. 1 *Peere Wms.* 622. Jones *v.* Laughton, 1 *Eq. Ab.* 392. Cusack *v.* Cusack, 2 *Bro. P. C.* 116. 8vo. ed.

Low *v.* Davis, 2 *Ld. Raym.* 1561.
Doe *v.* Goff, 11 *East*, 668.
Gretton *v.* Haward, 6 *Taunt.* 94. 1 *Mer.* 448. Overruled Doe *v.* Jesson, 2 *Bligh* 2, 58, and see Wilcox *v.* Bellaers, *Hayes Inq.* 1.

These are the general principles which govern the application of the rule; they are drawn from Mr. *Fearne's* elaborate essay on *Contingent Remainders*, which we recommend to the student's careful and patient perusal.

ninety nine years if he so long live, which will only give him a *chattel interest* that cannot coalesce with the estate limited to his heirs, which is *a freehold*:* or to give an *equitable* estate only to the parent, and a *legal* one to the heirs; for estates must be of the same nature to be capable of uniting, as both equitable, or both legal: † or to confine the particular estate to *one* parent, and limit the remainder to the heirs of the body of *both*.‡ And care must also be taken that *the whole of the particular estate be disposed of*, lest any estate of freehold be

* But in this case care must be taken to limit the freehold to trustees during the life of the parent, as otherwise the limitation to the issue, being contingent, will fail for want of a preceding estate of freehold to support it; and if the freehold be so limited, then the freehold in possession being in the trustees, who cannot be advised to concur in any act which tends to defeat the remainders, a recovery cannot be suffered during the parents' life. This limitation can rarely be recommended.

† This has been referred to in the preceding note on the rule in Shelley's case: the only remaining point on that subject to be noticed, is the instance of the estate of freehold being legal, and in trust for other persons, with a legal beneficial remainder to the heirs of the first taker. On this Mr. Fearne entertained doubts. But Mr. Butler seems to think that, as the courts of law cannot notice the trust, the estates must coalesce. *Fearne's Cont. Rem.* 6th ed. 34. And, in this opinion, we concur.

‡ The remainder will be contingent, and the heirs take as purchasers, Lane *v.* Pannell, 1 *Roll. Rep.* 238. Frogmorton *v.* Wharrey, 3 *Wils.* 125.

capable of *resulting to the ancestor to whose heirs the estate is limited.**

But the best and most usual mode is to limit to the parent or parents for life, with remainder, not to the *heirs* of his, her, or their body or bodies, but to the *son* or *sons* (or *children*,) and the heirs of his, her, or their body or bodies, so that the son, or sons, or children, shall take *as purchasers*, as persons *particularly and expressly designated*, and *not as the heir or heirs* of the parent or parents. But if the settlement be made *before* the birth of such children, the remainders limited to them must necessarily be *contingent ones* till they come *in esse*; and,

Son, and children may mean issue in a will. Mellish *v.* Mellish, 2 *Barn & Cress.* 533. W[illegible] *v.* Andrews, 2 *Bing.* 126.

* An use will not result contrary to the intent of the conveyance, as if an use be expressly granted away during the grantor's life, Tippin *v.* Cosin, *Carth.* 272, or if an estate for years be limited to him, as in Adams *v.* Savage, 2 *Salk.* 679. Rawley *v.* Holland, *Vin.* Vol. XXII. p. 189. Else *v.* Osborne, 1 *Peere Wms.* 387. But an use will result on a limitation, which may, by possibility, determine in the grantee's lifetime, as by forfeiture of a life estate, Wills *v.* Palmer, 5 *Burr.* 2615. and also if no estate whatever be limited during the grantor's life, Pybus *v.* Mitford, 1 *Vent.* 372. or, if there be a preceding limitation for years (not being to his use or for his benefit) Penhay *v.* Hurrell, 2 *Vern.* 370. The application of the doctrine to the point in the text is, that this resulting use will, under the rule in Shelley's case (which has been already explained) unite with the subsequent limitation, to the heirs of the body of the grantor, so as to give him an estate tail.

2 *Bl. Comm.* 171, 1 *Atk.* 581. Hopkins, *al.* Dale *v.* Hopkins, *Butl.* add. n. to *Co. Litt.* 271 b. and n. (2) to 265 a. and 290 b. (*s.* 111.) 1 *Fearne Contingent Rem.* 6th ed. 281.

consequently, subject to destruction, or to being defeated by the parents;* and hence the utility *of appointing trustees for preserving them.* The most common mode of limiting these remainders to the issue, is to *the first and other sons:* but this mode is sometimes objectionable, as it renders the eldest son independent of his parents; and it may, therefore, be advisable to limit the estate *to such son* of the marriage *as the parents, or the survivor of them, shall,* by deed or will, *appoint,* and to the heirs of his body; and, in default of such appointment, to the first and other sons, &c. in the usual manner.†

* Contingent remainders must be supported by a preceding estate of freehold; or, by an immediate preceding right of entry for an estate of freehold; and hence arises the doctrine of the destruction of contingent remainders by tenant for life. For if tenant for life, on whose particular estate contingent remainders are depending, commit an act of forfeiture, his estate is destroyed; and all contingent remainders depending on his estate are, consequently, defeated. But as it is held that an immediate right of entry in some third person for an estate of freehold, will support the contingent remainders, a limitation is introduced to trustees during the life of the tenant for life, in trust in case of forfeiture to enter and revest the estates displaced by the act of forfeiture; and by this right of entry in the trustees, the contingent remainders are supported.

Fearne, C. R. 286, 7th ed.

† This proposition is open to observation. In great family settlements it is generally the intent of the parties to make a certain provision for the eldest son, independent of the parents, in which case no power of appointment amongst

An estate tail cannot be transferred to another: but as the tenant in tail has a fee (though restricted) in him, he may convey a base fee to another by lease and release, bargain and sale enrolled, or by fine; that is, if he make such conveyance to A. and his heirs, A. and his heirs shall have a fee simple qualified, that is, so long as the issue of the tenant in tail continue.* And

No. 1. to *Co. Litt.* 331 a. and the books there cited. Of *Discontinuance*, see n. (1) to *Co.Litt.* 326 b. and (1) (2) to 327 a. 3 *Bl. Comm.* 171, 191, *Litt.* b. 3. c. 11. and *Co. Litt.* 325, *Gilb. Ten.* 107, 5 *Durnf.* and *East.* 104. Roe d. Crow v. Bald[illegible]e, and the c[illegible] of Martin d. Tregonwell v. Strachan *in notis.*

the children should be introduced. But if it be the wish to give the parents a control over the eldest son, this discretionary authority had better, in most cases, be confined to both the parents jointly, and not be extended to the survivor; and at any rate, if the power is to be given, it should not be confined to an appointment in tail, but should enable the parents to appoint to the sons any estate they may think proper, which may save the expence of a fine or recovery, by an appointment in fee.

In limiting an estate in strict settlement the parents should be questioned whether it is their wish to give preference to their own daughters, or to the daughters of their sons. If the first, then the limitations may be to the first and other sons in tail male, with remainder to the daughters of the marriage in tail male, with cross-remainders, with remainder to the sons in tail, with remainder to the daughters in tail. But if the latter, then to the first and other sons in tail male, with remainder to the sons in tail, with remainder to the daughters in tail. It will be found that the first is generally their wish. But in many settlements, the daughters of sons have priority.

* In the case of Took *v.* Glasscock, 1 *Saund.* 260, it was held that if tenant in tail by bargain and sale conveyed the lands to another and his heirs, the bargainee had but an estate descendible for the life of tenant in tail, and that his heir should take as special occupant. In Machell *v.* Clarke,

if the tenant in tail have also the immediate remainder or reversion in fee in himself, he may

2 *Lord Raymond* 778, Lord Holt denied the case of Took *v.* Glasscock to be law; and it was held that if tenant in tail convey the lands entailed by bargain and sale, lease and release, or covenant to stand seised, to the use of another in fee, and die, a base fee passes by the conveyance, and the estate continues, until it be avoided by the issue in tail by entry; and, therefore, the widow of the grantee will have dower, and, the grantee is not punishable for waste; and his alienation by feoffment, and other conveyance, is no forfeiture. It was also held in Machel. Clarke, that if tenant in tail bargained and sold, or covenanted to stand seised, to the use of one for life, with remainder to another in fee, the remainder was good until entry: but that if he covenanted to stand seised, to the use of himself for life, with remainder to another, the remainder is *ipso facto* void, because the issue have a right paramount to the title of the remainder. If tenant in tail by bargain and sale, lease aud release, or covenant to stand seised, convey to the use of another in fee, and the bargainee is seised by virtue of such conveyance; a fine afterwards levied by tenant in tail will extinguish the estate tail, and confirm the base fee, but will not discontinue the remainder-man or reversioner; who may, therefore enter on the failure of issue, and will not be driven to the action of *formedon*, Seymour's case, 10 *Coke* 96, which would be the case, if the fine had been levied before the bargain and sale, or had been levied in pursuance of a covenant, in the conveyance of the estate, Doe *v.* Whitehead, 2 *Burr.* 704. If tenant in tail in possession convey by fine or feoffment, it will operate as a discontinuance of the estate tail, and the remainder-man or reversioner will be driven to his *formedon*: but an actual entry will not be necessary to avoid the fine; the action must, however, in the case of the fine, be brought

convey an absolute fee to another, or gain an absolute fee in himself, by levying a fine; for the fine will pass the reversion, which is an absolute fee, as well as the base fee; and when both fees are fixed in the same person, the base fee merges in the absolute one, so that the absolute or reversionary fee comes into possession.*

within five years after the title accrues, 1 *Saund.* 261, note. If the conveyance be by feoffment, the issue may enter on the death of tenant in tail: but if it be by fine with proclamations, they will be utterly barred by force of the statutes, 4 *H.* VII. *c.* 24. 32 *H.* VIII. *c.* 36. But a fine at common law is not a bar, although, if levied by tenant in tail in possession, it discontinues the estate tail, and drives the issue to their *formedon*. And to be a bar, the proclamations need not be in the lifetime of the tenant in tail who levies the fine, 1 *Saund.* 258, 259. If tenant in tail creates a base fee, and afterwards levies a fine to other uses, the fine will operate to confirm the base fee, 8 *Term. Rep.* 214. But if he convey the whole fee away, it will be necessary, the grantee, &c. should concur in making a tenant to the *præcipe* in a common recovery, which, when suffered, will render the estate of the grantee absolute and indefeasible. And if tenant in tail by lease and release convey to the use of himself, for life, with remainders over, and afterwards suffer a common recovery to other uses, the recovery will enure to the uses of the settlement.

Tolson *v.* Kaye, 3 *Brod. & Bing.* 217. *J. B. Moore* 565.

* With all the incumbrances which have been created by any of the persons through whom it may have descended. When the reversion has descended on the tenant in tail, a common recovery should be suffered, for two reasons: First, it prevents the charges of his ancestors from taking effect; and, secondly, it precludes the necessity of tracing the title of the fee to him, which is otherwise unavoidable, and

1 *Cru.* 274. Symonds *v.* Cudmore, 4 *Mod.* 2. Shelburn and Biddulph, 6 *Bro. Parl. Cases* 356. 2 *Cru.* 284.

But as the tenant in tail (while tenant in tail) *may charge the reversion*, and as the fine when levied brings the *reversion into possession*, it is frequently prudent, and, indeed, necessary, in order to gain a good title, to suffer a recovery: as a fine lets in the charges of the tenant in tail, and a recovery gives a clear and new fee.*

2 *Bl. Com.* 359. *Pig.* 108 ch. 5. 22 *Cru.* 218.

Hence then is a recovery suffered by the tenant in tail, in most cases, the best and most effectual bar:† and this should be suffered with

often attended with expense and vexation; for, as the base fee is merged in the reversionary fee, it becomes essential to shew the regular descent of the latter, on the tenant in tail.

But a recovery will let in the charges of *the person suffering* it, though not those of his ancestors. See 2 *Cru.* 284, 8. and *post. B.* 2. *c.* 16.—Note by Mr. WATKINS.

* This sentence is very inaccurately worded; and certainly conveys the idea that a recovery, suffered by tenant in tail, will not let in his own charges. The note of Mr. Watkins is intended to correct it. In Stapilton *v.* Stapilton, 1 *Atk.* 8, Lord Hardwicke says, "If tenant in tail confesses a judgment, or a statute, or enters into a bond, and afterwards suffers a recovery to bar the estate tail, it lets in the preceding judgment, &c. and it is as clear, if a tenant in tail make a lease, not warranted by the statute of the 32 *H.* VIII, if he suffers a recovery, that lets in the lease, and makes it good; there are so many cases of this kind that it is not necessary for me to mention them."

Helps *v.* Hereford, 2 *Barn. & Ald.* 241.

† In some cases, indeed, a fine is a more effectual bar than a recovery; as the former is declared an estoppel or bar by the *Stat.* 32 *Hen.* VIII, while it would be at least

(at least) *a double* voucher, for if suffered with *a single one*, it only bars the estate *of which the tenant in tail is actually seised at the time;* but if with a double or treble voucher, it will bar every other interest he may have in the premises, as will appear under the head of RECOVERY.

A tenant in tail in possession may also, in some instances, bar both his own issue and those in remainder, by annexing *a warranty* to his grant, as the warranty will descend to his heirs, and, if accompanied with assets, will bar his own issue, and without assets will bar such of his heirs as may be in remainder or reversion. But the propriety of this mode depends upon much nice matter, and should be had recourse to with much caution; for should *no assets actually descend to the issue*, they will not be barred, nor will the remainderman or reversioner, *unless he be also the heir of the warrantor;* for, unless he be *the heir* of the warrantor, he will not be subject to the warranty.

See 2 *Burr.* 1072, &c.

2 *Bl. Com.* 303. *Gilb. Ten.* 133. and *Watk* n. LIV. &c. p. 400, &c.

The warranty descending on the issue is a *lineal* warranty, as the heir claims *through the*

doubtful whether the issue would be estopped merely by the vouching of the ancestor. *Post.* B. 2. c. 15. and c. 16.—Note by Mr. WATKINS.

There are cases in which a fine *must* be resorted to, as by tenant in tail in remainder to bar his issue, if the tenant of the freehold will not concur in a recovery; and also, if an estate tail be limited on a contingency.

warrantor; and lineal warranty is no bar without assets actually descending. But the warranty descending on those in remainder or reversion is *collateral*, as they do *not claim through the warrantor, but immediately from the donor;* and *collateral* warranty will bar without assets.*

Warranty. * The student must understand that the terms lineal and collateral, as applied to warranty, refer to the estate, and not the person, that is, if he on whom the warranty descends could, by possibility, have claimed the land as heir to him who made the warranty, it is lineal; if not, it is collateral: so that collateral warranty might descend on a lineal heir, and lineal warranty on a collateral heir. Thus in the instance put by Littleton, sect. 704, if the son purchase lands in fee, and his father disseise him, and alien with warranty and die, this warranty is collateral, because the son claimed not the land as heir to his father. And on the other hand, if a man be disseised, and the eldest son release the disseisor with warranty, and die without issue, and afterwards, the father die, this is lineal warranty to the younger son, because he might, by possibility, convey title to the lands through his elder brother, *Litt.* sect. 707. Warranties at the common law were of three sorts, namely, lineal, collateral, and commencing by disseisin: the latter warranty was no bar to the heir, and arose in the case of a disseisin with an intent to alien with warranty, and did not apply to the case of common disseisins. Lineal warranty, it should seem, could only imply an obligation to make recompence in case of eviction to the amount of assets descended; for as the ancestor might have parted with the estate, there was no occasion for it to rebut the claim of the heir. The effect of collateral warranty, on the contrary, was to estop the legal claim of those in remainder or reversion, on the presump-

And so established is the power of the tenant in tail to destroy the entail and alien by fine or recovery, that no condition restrictive of such power is permitted to take effect.* 1 Burr 84 No (1) to Co. Litt. 379. b But see Post B. 3. C 4. as to entails of the gift of the Crown.

And note, that express power is given by statute to Commissioners of Bankrupt to convey lands entailed of the bankrupt, by bargain and sale enrolled.† 21 Jac I. c 19 s. 12.

tion, it should seem, that they had received an equivalent; hence the warranty of tenant for life effectually barred the remainder-men if they claimed as heirs to him. But by the 4 and 5 *Ann* c 16 all warranties of tenant for life are now void, and all collateral warranties of any ancestor who had not an estate of inheritance in possession, are also void against the heir, lineal warranties remain as at common law, that is, they bind with assets. To apply the doctrine to estates tail, the collateral warranty of tenant in tail in possession is not avoided by the statute of *Ann.*, and, consequently, if a remainder-man is his heir, he will be barred As to the issue, it is held, they are protected by the statute *de donis*, and are only estopped by warranty with assets; and the reversioner also, it should seem, is in like manner protected by the same statute · see Bole *v.* Horton, *Vaughan* 360 · in all other instances, the doctrine of warranty appears to have become obsolete An able review of the doctrine will be found in Mr Butler's notes in *Co. Litt.* 373. *b.*

* This must be understood of a fine within the statutes 4 *H.* VII and 38 *H.* VIII. that is, with proclamations, for a condition restraining alienation by discontinuance such as by feoffment, or fine at common law, is valid. See *Fearne's Cont Rem.* 6th ed 260

† The conveyance must be by deed indented and enrolled, within six months after the making thereof, in some of His Majesty's Courts of Record, at Westminster, and it is

declared that all such conveyances shall be good against the bankrupt and his issue, and all other persons, whom he, by common recovery, or other ways or means, might cut off, or debar from any remainders, &c.

On this statute it has been considered (See *Fearne's Posthuman* 83) that if the bankrupt, at the time of his bankruptcy, is entitled to a vested estate tail in remainder expectant on an estate of freehold, the commissioners can make no better title than the bankrupt himself could, that is a base fee, determinable on failure of his issue, in remainder expectant on the determination of the preceding estate. If this view of the statute be correct, the remainder-man or reversioner will not be barred, unless the estate tail should fall into possession during the life of tenant in tail, when, as we apprehend, a second bargain and sale by the commissioners would give the absolute fee.

END OF PART I.

ERRATUM.

PART II.

P. 116. l. 5, *for* Likeness to the specialty debts, &c. *read* —Likeness to the bond, and specialty debts of the ancestor when the estate is in the hands of the heir or devisee, but not to simple contract debts except under the 17th Geo. III. where the ancestor is a trader.

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PRINCIPLES

OF

CONVEYANCING, &c.

CHAPTER IX.

OF AN ESTATE IN FEE SIMPLE.

AN Estate in fee-simple is either *absolute*, or *qualified* or *base*.(a) An estate in fee *absolute* is

2 *Bl Comm.* 104. *Litt* b. c. 1. *Wright Ten.* 146. *Prest. Est.* ch. 2.

(a) For all practical purposes the student may consider estates in fee as divided into—1. Estates in fee simple.—2. Estates in base fee.

The *first* estate includes every other, and confers on the owner the entire and absolute dominion over the property. It can create every other estate out of it, and every other estate will merge in it. The attributes of this estate are:—

1. An unlimited power of alienation by deed or will.
2. An uncontroulable power in the commission of waste.
3. Liability to dower and curtesy.
4. Liability to docketted judgments; enrolled annuities charged on the land; all the debts of a bankrupt trader; and crown debts of record; as also to undocketted

an estate limited to a person and his heirs, general or indefinite. It is not confined to any

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judgments, unenrolled annuities, and simple contract crown debts, *with notice* before the contract for purchase. Likewise to the specialty debts of the ancestor when the estate is in the hands of the heir: but not to simple contract debts, nor to bond or specialty debts when the estate is in the hands of a devisee.

7 East 128.

5. Descent to heirs general, according to the canons of inheritance.

6. Escheat to the lord of the manor for want of heirs. And

54 Geo 3 c. 146. *Co. Litt.* 499 b. 41 a. 3 *Pres. Abs.* 392. 2 *Watk. Cop.* 364. 4th *Ed.*

7. Forfeiture for treason, murder, and felony. *Treason*—to the king absolutely. *Murder*—to the king for a year day and waste, and after to the lord of the manor absolutely. *Other felonies*—to the king for a year day and waste, and after the rents and profits belong to the lord of the manor as *bona felonum* for the residue of the felon's life, the legal estate being still in him. On his death the estate descends to his heir.

10 *Co.* 95. *Co. Litt.* 332 a. 2 *Ld. Raym.* 778. *Gilb. Ten.* 121.

The *second* estate arises where a tenant in tail with remainder to a stranger aliens in fee, either by fine, feoffment, or any other species of assurance,—the alienee is said to have a *base fee*, that is, a fee simple determinable on the failure of the issue in tail. If the tenant in tail aliens by fine with proclamations, the issue are barred, and the remainder is discontinued, that is, turned into a right, and remains unalienable till the seisin be restored by action. The issue being barred, the alienee holds in fee till there is a failure of such issue, on which event the remainder falls into possession or rather commences in right, and the base fee is determined. If the tenant in tail aliens by any species of assurance which does not bar the issue, the base fee is liable to be determined by the *entry* of the issue, with this distinction, that if the assurance creating the *base* fee be a feoffment, the issue are deprived of their right of *entry*, being driven to their *action*

particular line or species of heirs, but is limited to the heirs generally; and it is the highest estate which the law acknowledges in a subject.

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of formedon, as will be more fully explained in a subsequent chapter. The base fee during its existence has all the incidents of a fee simple except the first; and, unlike an estate tail, it will merge in the immediate remainder or reversion whenever the two estates become united in the same person. If this estate be created by lease and release, the tenant cannot levy a fine which will have any effect on the remainder, because a lease and release, being, in the language of the law, an innocent assurance, it does not operate to discontinue the seisin under the remainders; and it is a rule that a fine cannot operate by non-claim against any person unless the estate of that person be discontinued and turned into a right. If the base fee be created by feoffment, fine, or any other tortious mode of conveyance (a term to be explained in the sequel) the operation of the feoffment, fine, or tortious alienation will be to convert the seisin under the remainder into a right of action which a subsequent fine by the tenant of the base fee may well enough bar by non-claim, if the remainder man sleep upon his right of action for five years after its commencement, that is, either for five years after the fine levied, or for five years after the determination of the estate tail by failure of issue.

An estate in fee simple may be created by *deed or will.*

If by *deed*, the word "heirs" is absolutely necessary to its creation; and no other word or periphrasis can supply its place, except the word "successors" in a grant to a corporation. If, therefore, a grant be made to a man without the word "heirs," or to him "for ever," or to him and "his assigns for ever," or to him "in fee simple," or to him and "his heir" (by some) or to him "for an estate of inheritance in fee simple," or to him "and his blood," or to him "and his successors," or to him "and his lineal or collateral descendants and re-

Co. Litt. 8 b. *Perk.* 243. 20 H. 6. f. 36.

An estate in fee *qualified* or *base* is an estate to *A.* and his heirs *'till a certain event happen,*

lations"—in all these instances he will take an estate for life only, although livery of seisin be made therewith "to hold to him and his *heirs* according to the within written indenture." The common law adopted this strict and salutary rule to "avoid uncertainty, the mother of contention;" and it has often been lamented that the same rule has not been adhered to in the construction of wills. So a limitation to "*A.* or his heirs," or "to two persons and heirs," will confer but an estate for life, on account of the uncertainty. But a gift to one person *and heirs* passes a fee, and it is the better opinion that a limitation to a person and his *heir* will confer a fee. A fee simple will pass to a corporation aggregate as also to a "dean and chapter," which is a sole corporation, without any words of succession: but a bishop, parson, or other sole corporation cannot take a fee by deed without the word "successors." The word "heirs" as to them will not be sufficient to carry the fee.

1 *Plow. Com.* 25 b. *Co. Litt.* 13 b. 29 H. 6. f. 73.

Dubber *v.* Trollope, *Amb.* 453.

1 *Roll. Ab.* 833. *Co Litt* 94 b. 1 *Atk.* 437.

In this estate there may now be a seisin, a use, and a trust. Thus, in a conveyance to *A.*, to the use of *B.*, in trust for *C.*,—*A.* has the seisin, *B.* the use, and *C.* the trust. By the statute of uses the seisin of *A.* is transferred to *B.* immediately on the execution of the conveyance. *Before* that statute the seisin or legal estate remained in *A.*; and *B.* took a mere equitable estate, that is an estate not recognized at law but only in equity, the trust of the present day being then unknown. To create a fee simple in the seisin, it was necessary to observe the rules above alluded to: but a fee simple might have been created in the use as it existed then by any words or circumstances indicative of an intention in the parties to create such an estate. Thus if *A.*, in consideration of 100*l.* paid by *B.*, conveyed an estate to *C.* and his heirs, to the use of *B.* without more, or to him and his assigns for ever, &c. *B.* would have taken an estate in fee simple. The reason was that uses

or *to be defeated if such an event occur:* as to A. and his heirs tenants of the manor of Dale.

at that period being only cognizable in a court of equity, the chancellor held it accordant with good conscience that the *intention* of the parties should be carried into effect, though in doing so, some of the rigid rules of law might be contravened. Then came the statute of uses, and enacted that the "estate, right, title, and possession," of *A.* should be transferred to and vest in *B.* in such quality, manner, form, and condition, as *B.* previously had in the use. Now, by the last mentioned form of limitation, *B.* took an estate in fee simple in the use before the statute; he should therefore receive an estate of a similar description in the seisin and use consolidated in him since the statute. The statute, moreover, transfers the *estate* of the seisinee to the person having the use; that estate in the above instance was the fee simple, which, therefore, should be considered as transferred to and vesting in *B.*—*B.* then having the seisin in fee, and the use in fee: the question is, whether that fee is to be reduced to an estate for life, because the words creating the *use* were insufficient at law to create a larger estate, or whether all uses since the statute are not to be viewed as legal estates from their inception. That the seisin is not so completely absorbed in the use as to be indistinguishable from it, is evident from the fact that at this day the seisin must be commensurate with the use to create a fee simple. Thus, if an estate be conveyed to *A.* generally, or "in fee simple," &c. (so as to give him a mere life interest by the rules of law) to the use of *B.* and his heirs, *B.* will take an estate for the life of *A.* only. The statute of uses effects a species of merger. At the present day the trust merges in the legal estate, and not *vice versa.* So before the statute, the use merged in the seisin, and not the seisin in the use. The statute did not alter the nature of the estates, but declared that the seisin should be transferred to the use. The

Meredith v. Jones, *Cro. Car.* 244. *Co. Litt.* 42. 1 *Sand.* 109.

Here, so soon as *A.* or his heirs cease to be tenants of that manor, the estate will cease.

consequence of that statutory conveyance was to merge the use in the seisin. It is *A.*'s seisin, therefore, that becomes the estate in possession in *B.*: and that seisin being a fee simple, and the quantity of interest in the use being also a fee simple (though not created by the means the common law recognizes) it should follow that a Court of Law would hold a conveyance to *A.* and his heirs, to the use of *B.* "in fee simple," as conferring an estate in fee on *B.*; and not merely an estate for life, as it would indubitably do if the limitations were reversed.

27 H. 8. f. 6. It is laid down in the year books, that if a tenant in fee *bargain and sell* his land by deed indented and enrolled, though the habendum be not to the bargainee "and his heirs," yet he shall have the fee because the seisin in fee is in the bargainor, and the indenture and consideration raised the use which passed to the bargainee on the execution of the deed. The statute has since transferred the seisin in fee to the use. On the foregoing principles then it should follow that a bargain and sale for value will, since the statute, convey the fee simple of the bargainor to the bargainee without the word "heirs." Such, however, was not the obiter opinion of Walmsley J., who, after expressly referring to this case, observed, that "the uses since the statute are transferred and made into an estate in the land; and, therefore, he said that if after the statute one person bargains and sells land to another generally for money, he (the bargainee) hath but an estate for life." Whether that opinion be well founded is submitted to be at least doubtful. It is adopted by Mr. Sanders and other writers: but they do not cite any other authority, or investigate the basis of the position. The point may occur if the word "heirs" should be accidentally omitted in the limitation of the use; and it is not improbable that a court of law would at this day adopt any line of ar-

Corbet's case, 1 Co. 87 b.

1 *Sand. Us.* 4th. ed.

The estate in fee simple absolute may be conveyed *ad infinitum*; but it being an estate of

gument in support of their golden rule, that conveyances shall be construed according to the intention of the parties and be declared valid rather than void.

Trusts are now what uses were formerly; and it may be inferred from the preceding observations, that a fee simple in a trust may be created by any words indicative of an intention to create that estate without the presence of the word "heirs."

It may also be proper to mention, that in fines and recoveries an estate in fee will pass by the simple operation of those instruments without the word "heirs." *Co. Litt.* 9. In short, they cannot pass a less estate: but the uses founded on the seisin of the conuzee or recoverer may, of course, be moulded to any variety. And a rent granted by one coparcener to her companion for equality of partition will enure in fee without the word *heirs*, *Co. Litt.* 9.

The following words in WILLS have been considered, and for the most part decided and adjudged to pass an estate in fee simple to the devisee:—

To "*A.* for ever." *Cro. Car.* 129. 1 *Bro. Ch. Ca.* 147.

To "*A.* and his assigns *for ever*:" but to "*A.* and his assigns" gives only a life estate. 3 *Salk.* 127.

To "*A.* and his *blood*:" 1 *Roll. Abr.* 834: but to "*A.* and his *seed*" gives an estate tail only. *Co. Litt.* 9 b.

To "*A.* and his *house*." *Dy.* 333 b.

To "*A.* and his *stock*." *Hob.* 33.

To "*A.* and his *posterity*:" 1 *H. Black.* 461. *Freem. Ch. Ca.* 268.: but *qu.* if this be not like a devise to "*A.* and his *seed*," which will confer an estate tail only.

To "*A.* and his *family*." 17 *Ves.* 261.

To "*A.* for life, and after to my family,"—the testator's heir will take the fee under the word *family*. 1 *Turn.* 113.

freehold in possession (for we are not here to speak of reversions) the freehold must actually

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* WILLS.

To "*A.*'s *family*," or to "*A.* for life and afterwards to his family," will perhaps give *A.* the fee. *Hob.* 33. 5 *Ves.* 167. 3 *East.* 172. 17 *Ves.* 261: 1 *Turn.* 143.

To "a woman and her *heirs*, so that it shall remain in the *family*"—doubtful whether in fee or in tail. *Semb.*

To "*W.* to be kept in the name and family of *W.* as long as can be,"—held to pass an estate of inheritance; but whether in fee or in tail was not decided. 1 *Barn.* & *Ald.* 518.

To "*A.* of the land of my house."—*Semb.*; though *land* alone, will not pass the fee; 1 *Ves. Jun.* 78. much less "goods, lands, and chattels;" *Pr. Ch.* 471. but where a testator "constituted *R. G.* sole executor of his land for ever," the fee was held to pass, 5 *Barn.* & *Ald.* 785.

To "*A.* and his heir;" 1 *Roll. Abr.* 832. *Skin.* 563. 1 *Vent.* 215; but a devise to "*A.* and his next heir male," or to him "and the heir of his body for ever," will give an estate tail. *Amb.* 454. *Sty.* 249. *Com.* 289.

To "*A.* and heirs," without adding *his*. *Co. Litt.* 13. 4 *T. R.* 39.

To "*A.* *or* his heirs." 2 *Atk.* 645. *Plowd.* 286, 289.

To "*A.* and his heirs *during their lives*"—the words in italics being considered as repugnant and void. 12 *East.* 515.

To "*A.* and his heirs, but if he die without heirs, to *B.* in fee." *A.* takes an estate in fee, if *B.* be a stranger to him: but if *B.* be of his blood, or if *A.* be a denizen or a bastard, he will take an estate tail. (*Semb.*)

To "*A.* in fee simple." *Perk. s.* 557. *Gilb. Dev.* 18.

Of "the fee simple to *A.*, and after his death to *B.* for life." *A.* has the reversion in fee. *Dy.* 357. 1 *And.* 51.

To "*A.* to hold to him and *his.*" *Bendl.* 11. pl. 9. WILLS.

"To be *her's* at my decease." But qu. if more than an estate for life will pass by this devise, the words pointing to *time* and not to *interest.*

To "*A.* and his executors." 3 *Burr.* 1881. *Co. Litt.* 388 a. 5 *Ves.* 403. *Fearne P. W.* 144: but *qu.* if these words pass a fee, "and I appoint *A.* my executor of all my real and personal estate not hereinbefore disposed of." See and consider 5 *Barn. & Ald.* 785.

To "*A.* for life, and after to his next of kin," *i. e.* his heir. *Semb. et vid.* 5 *Ves.* 403.

To "*A.* and his legal representatives." *Semb. et vid.* 3 *Bro. C. C.* 224.

To "*A.* and his successors." 3 *Bulst.* 194. *Moore* 853.

"I make *A.* my sole *aire* and executor." *T. Jones* 25.

To "*A.* to dispose and employ the same on her and her son at her will and pleasure." *Moore* 57. *Bend.* 11. pl. 9.

To "*A.* to give away at her death to whom she pleases;" or "to leave to whom she likes." 2 *Atk.* 103. 2 *Wils.* 6. 10 *East* 438, 443.

To "*A.* for life, and if he should not live to *spend* it, to *B.* in fee." *A.* takes in fee with an executory devise over. *Semb.*

To "*A.* and to his to do what he will with it." *Latch.* 9, 36.

To "*A.* to do therewith [or to dispose thereof] at his will and pleasure." 6 *Mod.* 111. 1 *Leon.* 283.

To "*A.* to give, sell, or do therewith at his pleasure." 1 *Leon.* 156. 2 *Wils.* 6.

To "*A.* to dispose of for payment of all my just debts." 1 *Ch. Ca.* 196.

To "*A.* to be at his discretion." 1 *Leon.* 156.

To "*A.* to give to his children," or "to make provision for his children." 6 *Mod.* 110, 111.

To "my wife to be divided and disposed of to my

WILLS.

children"—the wife takes a fee from the word *dispose*. *W. Kely*. 6.

"To be equally *divided*" does not mean to be equally divided in fee. *Cro. Eliz*. 498. 1 *Roll. Abr*. 834.

To "*A*. for life, and after her death to her lawful issue —if she has no issue, for her to have power to dispose thereof at her will and pleasure." The contingency of issue not having happened, she took a fee. 2 *Wils*. 6.

To "*A*. freely to be enjoyed." *Cowp*. 352.—*Contra* 11 *East* 220, where the words "freely to be possessed and enjoyed" were held to mean free from incumbrances.

Of "all the residue of my real estate." *Pr. Ch*. 264. 3 *P. Wms*. 295. 2 *T. R*. 659. 1 *Ves*. 10. 1 *Wils*. 333. 2 *Ld. Raym*. 1321.

Of "all the rest and residue of my estate." 4 *Mod*. 90. 3 *Ib*. 228. 2 *Vern*. 564.

Of "whatsoever else I have not disposed of." 1 *Salk*. 239. *Com. R*. 164.

Of "all my lands not before devised." 2 *Vern*. 461. But a devise

Of "my manor of *S*. and all my lands in *N*." will not carry a fee. 1 *Price* 353.

Of "all my concerns." *Ca. temp. Talb*. 286.

Of "all I am worth." 1 *Bro. C. C*. 437.

Of "all my worldly substance." *Cowp*. 306.

Of "all my real *property*." 18 *Ves*. 193. 14 *East* 370. *Ibid*. 221.

That "all my children shall share equally in all my property." 1 *Jac. & W*. 189.

Of "all my estate real and personal." 18 *Ves*. 193. 11 *East* 518.

Of "all my personal estate," the intention being clear. 11 *East* 246.

Of "all that I am possessed of in the parish of *A*. consisting, &c." *Semb*.

Of "all my property both personal and real for ever." 11 *East* 518. 14 *Ib.* 370. 16 *Ib.* 221. WILLS.

Of "all my property whatever and wheresoever." 2 *New Rep.* 214.

Of "all my right in *B.*" 1 *Ld. Raym.* 187.

Of "all my interest." 5 *T. R.* 295. *Doug.* 763.*

Of "all my right, title, and interest." 3 *Bro. P. C.* 7. Tom. ed.

Of "all my lands, tenements, and *hereditaments*," *per* Holt, C. J. 11 *Mod.* 90, 102. 2 *Salk.* 685. *Holt* 235. 3 *Wils.* 416. But now held otherwise. 3 *T. R.* 356. 5 *Ib.* 558. 6 *Ib.* 175. 1 *Salk.* 239. *Mos.* 240. Nor will 'hereditaments' alone give the fee. 1 *Bos. & Pull.* 558. 2 *Ib.* 247. 3 *Anst.* 781. This word gives a fee according to the context. 1 *Bos. & Pull.* 243. *Sed qu.* as to the word *hereditaments* alone; and see 2 Leon 169.

To "*A.* for life, and after her decease I devise all my lands, tenements, and hereditaments, not disposed of to *B.*:" he takes the fee: 2 *Vent.* 285. *Carth.* 50.: but "all my lands, freehold, copyhold, and leasehold, in the county of Essex," give an estate for life only. 8 *T. R.* 67. 1 *Price* 353.

Of "my *inheritance* in *W.*," or "my inheritance therein;" or to three persons "as trustees of inheritance for the execution of my will." *Moore* 873. *Hob.* 2. But "all my lands of inheritance" seem to import the same as "all my hereditaments;" and whether that word alone will carry the fee is not yet definitively settled; see 2 *Ld. Raym.* 834.

Of "all my goods, chattels, and personal estate, together with my real estate." 3 *Atk.* 486. 1 *Ves.* 10.

Of "all my estate and effects:" but this depends on the context and intention. 9 *Ves.* 143.

Of "the *residue* of my *estate* and *effects* to trustees, and out of such residue to manage my farm." 5 *Barn. & Ald.* 18.

Of "all the residue and remainder of my *effects* both

WILLS.

real and personal;" *Cowp.* 299. 3 *Bro. P.C.* 388. Tom.; but "all my *effects*" will not include real estate, except the intention be very manifest; nor will "all the rest, residue, and remainder, of my *effects* wheresoever and whatsoever and of what nature, kind, or quality soever;" nor will "all the rest and residue of my goods and chattels, personal and *testamentary effects* whatsoever." 3 *East* 516. 1 *East* 33. 11 *East* 290. 15 *East* 394. 2 *Mau. & Selw.* 448. 3 *Brod. & Bing.* 85.

Of "all that my remainder." *Lutw.* 764. 1 *Ld. Raym.* 187.

Of "all that my reversion." 2 *Ves.* 48. *Contra,* 1 *Vern.* 65.

"*A. B.* to enjoy all that remains to me after payment of the above sums." *Semb.*

Of "all other my part, share, and interest, of and in the estates late of the said *A. B.*" 5 *T. R.* 292.

Of "all that my *share* of the *Bibury* and other estates situate at *A.*" 5 *Mau. & Selw.* 408.

Of "all that my half part" by one tenant in common in fee to his companion: *Semb.* 11 *East* 160.: but the word *share* alone in a substitution clause will not pass a fee. *Skin.* 339. 2 *Vern.* 388. 8 *Vin.* 344.

To "trustees in fee in trust for *A.*" without more, *A.* takes an equitable estate in fee. 8 *T. R.* 597.

To "daughters equally, if one die before the other, then one to be heir to the other." 1 *Roll. Abr.* 833.

To "*A.* in fee, to *B.* to hold in the same manner." *Co. Litt.* 96. 2 *Bac. Abr.* 534. 1 *Eden* 143. *Amb.* 363. But under a devise to "sons in tail, remainder to daughters as tenants in common," it is questionable whether the daughters will take in tail. 1 *Bro. C. C.* 240. 1 *Meriv.* 654.

To "*A.* and his heirs of *Greenacre* for his part, and to *B.* of *Whiteacre* for his part." *Co. Litt.* 8, 9.

Of "all my estate to such uses as *A.* shall appoint." 3 *Ves.* 470.

Of "all my *temporal* estate." 3 *P. Wms.* 294. *Ca. temp. Talb.* 284. WILLS.

Of "all my *testamentary* estate." 2 *H. Black.* 444. 3 *Brod. & Bing.* 85.

Of "*all* to my grandchildren:" *Semb.*: but see 1 *Swan.* 201.

Of "all that my *estate.*" 2 *Lev.* 91. 6 *Mod.* 106. 9 *Ves.* 137. 7 *East* 259. 1 *T. R.* 411. 2 *Ves.* 48. 2 *T. R.* 659. 2 *Show.* 328. 1 *Ves.* 228.

Of "all that estate I bought of Mead." 2 *Ves.* 48.

Of "all my estate *at S.*," or "*in T.*," or "of *A.*" or "all my *A.* estate." *Ca. temp. Talb.* 157. But "all my estate in the *occupation* of *A*," or "*lying in B.*," or "*situate at S.*," or "called or known by the name of *C.*," will pass estates for life only. *Amb.* 344. 3 *Wils.* 418. *Cowp.* 299. 8 *East* 141. 2 *T. R.* 656. 1 *Bos. & Pull.* 243. *Lofft* 224. 4 *Taunt.* 176. 6 *Taunt.* 317, 410. 7 *Taunt.* 35. 4 *Mau. & Selw.* 366. 5 *Ib.* 408. 5 *East* 533. 3 *Ves. & B.* 160. 2 *Eden* 115. 1 *New R.* 335. 8 *Ves.* 604. 4 *Barn. & Ald.* 574. 5 *Ib.* 785. 3 *Barn. & Cress.* 870. This rule however is now relaxing; and the disposition is to allow the word *estate* its omnipotent signification, if it be not accompanied with the very words which have been held to confine its meaning to locality. Thus, a devise of "all my freehold estate, consisting of 30 acres, *situate at S.* now in the occupation of *G.*," has been held to carry the fee. 1 *Brod. & Bing.* 72. 3 *J. B. Moore* 565 against 7 *Ves.* 546.; and see 2 *Marsh* 117. 6 *Taunt.* 410. So a devise "of all my estate real and personal, that is to say, my land *situate at S.* on my estate," has been held to carry the fee; 7 *Taunt.* 35.; *et vide* 2 *Bing.* 456, as to the words "now in my occupation."

To "*A.* generally, but if he dies under 21 to *B.* in fee," or "to his own heir." *A.* attaining 21 takes the fee. 2 *Saund.* 388. 3 *Burr.* 1618. 9 *East* 400.

WILLS.

"In case my daughter shall die under 21 unmarried *and* without issue." If the daughter had attained 21 she would have taken the fee; but she dying under 21 a married woman without issue, it was held that the testator's heir was entitled. 2 *Barn. & Ald.* 441.

"Of all my real and personal estate to executors in trust for *A.* till 21, then the trust to cease." *A.* takes in fee. 1 *Eden* 479. *Amb.* 396.

To "*A.* on condition that he pay 20*l.* to *B.*" *Co. Litt.* 9 b. 8 *T. R.* 2.

To "*A.* on condition that he release *B.*'s debt." 1 *And.* 35. 2 *Ib.* 13. *Bend.* 19.

To "*A.* on condition that he allow *B.* a maintenance." *W. Jones* 107. *Pollexf.* 545.

To "*A.* he paying my just debts and legacies," or "charged" or "subject" to such payment, or to "*A.*, my legacies being first paid." 2 *Vern.* 687. 2 *Show.* 36. 3 *T. R.* 356. 8 *Ib.* 1. 4 *East* 496. 5 *Ib.* 87.

To "*A.*, but he to allow my son to have a living in the house." *Semb.*

To "*A.* on condition that he pay a legacy of 120*l.* to *B.* six months after my decease," where the estate is of the annual value of 10*l.* 2 *Lev.* 249. 2 *W. Jo.* 113. But *A.* would take for life only, if the legacy do not exceed the first year's rent, for as legacies are not payable till twelve months after the testator's death, the devisee could not possibly sustain a loss by taking a life estate and making the payment. If however the legacy be directed to be paid immediately, he will take the fee. 8 *East* 141. 2 *New Rep.* 343. 3 *Mau. & Selw.* 516, 518.

To "*A.* upon condition of his paying 30*s.* annually" whatever the rent. 2 *Show.* 49. 2 *W. Black.* 1041. 5 *T. R.* 13, 292. 3 *Burr.* 1533.

To "trustees of my freehold, copyhold, and all my

pass; as by feoffment, lease and release, bargain and sale enrolled, (*a*) &c.

An estate in fee qualified or base may also be transferred by the same means, subject to the qualifications: but it cannot be conveyed discharged of such qualification, unless by wrong, as by a feoffment in fee, which would gain a fee absolute by disseisin†, and turn the reversion to a right, and which right would be barred by a

* personal estate, after payment of certain legacies and annuities." 2 *Barn. & Cress.* 357. WILLS.

To "executors to sell and convert into money," or "to be sold and the money to be applied by my executors." 2 *Sim. & Stu.* 238. 4 *Madd.* 44, 142. 1 *Jac. & W.* 189.

To "*A. B.* and *C. D.* in trust to pay the rents to testator's nieces." The legal estate in fee will pass to the trustees. 2 *Brod. & Bing.* 623.

(*a*) As the Author is not in this paragraph speaking of fees-simple in *reversion*, it may be inferred that a conveyance of an estate in fee simple in reversion need not actually pass the freehold at the time the deed is executed. Such an inference is not founded in law. The freehold of the reversion must actually pass out of the grantor into the grantee immediately on the execution of the grant, and not at any future period. The necessity of the proviso in the parenthesis is not therefore very obvious.—Here note that the fee simple may be in abeyance though the freehold may not, as is the case with every contingent remainder in fee.

† An estate gained by wrong is always a *quasi* fee: as the law cannot take notice of a wrong, it cannot, of consequence, set any limits to that wrong. See *Hob.* 323.—Note by Mr. Watkins.

fine levied by the feoffee, unless the person having such right claim within the time allowed by the statute of Hen. 8. (*a*)

(*a*) It is questionable whether a feoffment by a tenant of a determinable fee will turn the seisin under the reversion into a mere right. To a due apprehension of the position in the text, we must distinguish between a determinable and a base fee: the former arises where a testator devises an estate to *Samuel Rolle* and his heirs of the name of *Samuel Rolle* for ever. Here no reversion arises to the testator's heir at law, but only a possibility of reverter, which *Samuel Rolle* cannot bar or affect by any means. This, therefore, cannot be the qualified fee alluded to by the learned Author. The only determinable fee which sustains a reversion is that of the base fee described in a former page (*ante*, p. 116.); with respect to which it is observable, that if the remainder or reversion be not turned into a right by the means resorted to for the creation of the base fee, that is, if the base fee be created by an innocent assurance, the reversion cannot afterwards be turned into a right, either by the tenant in tail or the tenant of the base fee;—not by the former, because he being no longer seised by virtue of the entail cannot discontinue the remainder; nor by the latter, because there is no privity between the tenant of the base fee and the remainder-man. See *Hard.* 400. *Irish T. R.* 567. And it should be borne in mind, that a feoffment at this day does not operate by disseisin in the way it was supposed to do in Mr. Watkins' time. 1 *Burr.* 60. 2 *Cowp.* 689. 3 *Price* 575. 3 *Barn. & Cress.* 388. If the estate tail be spent and the base fee determined, then a continuation of possession by the tenant of the base fee for five years after a fine levied by him when seised in right of the base fee, would bar the remainder-man or reversioner, which is all perhaps that the learned Author intended to intimate by the above passage. The conclusion of the paragraph shews his meaning, " un-

A base or qualified fee may by possibility continue for ever; and the common law did not therefore permit any limitation on a fee either absolute or base. (*a*) A fee may now, indeed, be limited on a fee by way of *executory devise* or of *shifting use*; of which limitations I shall speak in subsequent chapters. 1 *Fearne*, 516, 7.

less the person having the right claim within the time allowed by the statute" what is that time? Five years after the right accrues; consequently the qualification is not absolutely discharged until five years after the happening of the event upon which the determinable fee depends. This perhaps is the inference intended by the text.

(*a*) There may be a reversion or possibility of reverter on a base or qualified fee; but the base or qualified fee cannot be a particular estate supporting a remainder, because the particular estate and remainder must be created together by the same deed, which it is evident could not be the case with a base fee and reversion.

CHAPTER X.

OF AN ESTATE IN PARCENARY.

2 *Bl. Comm.* 187, 323. *Litt* b. 3, c. 1. *Gilb. Ten.* 72—73.—*Shep. Touchst.* 14. 1 *Cru.* 104. *Com. Dig. Tit. Parc.*

COPARCENERS always take by descent; and, as they compose but one heir, they have as to some purposes, but one freehold; but, as to others, several; hence they may convey *to each other,* either by release, by feoffment, or fine. (*a*)

(*a*) Coparceners though they have a unity have not an entirety of interest. They are properly entitled each to the whole of a distinct moiety. They may be said to have a several seisin as between themselves, and a joint seisin as it regards strangers. Being seised in moieties there is no survivorship between them. On the death of one coparcener her moiety descends to her heir at law, subject to her husband's curtesy if he be living, but the heir (though a male, and a collateral), or the husband as tenant by the curtesy, holds with the other coparcener in coparcenary. If the heir being a male dies in possession leaving a widow, she it is apprehended will be entitled to dower and hold in coparcenary. In gravelkind the descent is to all the sons equally, and they hold in coparcenary. This tenancy is destroyed by devise or alienation to a stranger. The effect of such devise or alienation is to convert the coparcenary into a tenancy in common. *Co. Litt.* 174 b. 175 a. But if there are three coparceners and one aliens, the other two hold in coparcenary as between themselves; with respect to the alienee, they hold in common. The possession of one coparcener is that of the other so as to create a seisin in the

As *to strangers*, they must convey their respective portions or shares by such a conveyance as

other and carry her share by descent to her heirs although that other never actually entered; *Doe* v. *Keen*, 7 *T. R.* 386; and entry by one coparcener, when not *adverse* to her companions, enures to the benefit of all. *Doe* v. *Pearson*, 6 *East* 173. 2 *Smith* 295. When an advowson descends to coparceners, they present according to seniority, the eldest sister taking the first turn, the second the next, and so of the rest. *Plow*. 333.

Coparcenary relates to the estate—joint-tenancy to the person.—Hence a man may be coparcener with himself. Suppose two moieties of an estate to descend upon the same individual; one from his father, and the other from his mother; he may fairly be said to possess the estate in coparcenary, for on his death without lineal descendants one moiety will descend to his heir on the part of his father, and the other to his heir on the part of his mother.

That the seisin of coparceners is *joint*, is evident from the circumstance that one may release to the other without a bargain and sale for a year to vest the seisin; that it is *several*, is evinced by the validity of a feoffment from one coparcener to his companion. A tenant in common may enfeoff his companion, because the freehold is several, but he cannot release to him for want of a joint seisin. A joint-tenant may release to his companion because the freehold is joint, but he cannot enfeoff his companion for want of a several seisin. Coparceners however may both release to and enfeoff their companions; for their seisin is both joint and several. *Co. Litt.* 200 b. The effect of a release from one coparcener to another is not exactly settled. Thus it is remarked by an eminent writer that a release from one coparcener to another does *not* make any degree in the title; the releasee being in by descent and not by purchase. 2 *Pres. Abs.* 70. The consequence of this position is that judgments against the releasor are not incumbrances. But by Lord Coke, "if there be two coparceners

will pass the freehold; as by fine, recovery, feoffment, lease and release, or bargain and sale enrolled; or they may covenant to stand seised.

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and the one release all his right to the other, this shall enure by way of *mitter l'estate* and *shall make a degree*, and without the word 'heirs' shall pass the whole fee simple." *Co. Litt.* 273 b. And this seems the preferable doctrine, as will appear by the following considerations. When two persons take a joint seisin on a descent or conveyance, the notoriety attendant on that event is sufficient to support a release by one to the other of them without a second delivery of seisin. *Gilb. Ten.* 72. Indeed a second delivery of seisin would be nugatory, as the releasee is already as much in the seisin of the whole estate as he would be by another delivery of it. A release by one of two joint seisinees to the other of them is called as above a release by way of *mitter l'estate*. This species of release does not operate directly by enlargement, for the releasee has no *estate* in his companion's moiety which may be enlarged. It simply conveys the estate of the releasor in a moiety of the land to the releasee without the necessity of livery of seisin. The releasee takes the estate by conveyance, the seisin being already in him by descent. The seisin is swallowed up in the estate so that the release operates by extinguishment in one sense and by enlargement in another, but as it does not operate directly in either way the law properly calls it a release by way of conveyance, and if of conveyance the releasee must be in by purchase and not by descent. He must come in in the *per*, by or through his companion, and not paramount him by their common ancestor. The consequence is, that if a woman entitled to an estate marries and dies, leaving two daughters, and one of them releases to the other, and then they both die without issue, one moiety of the estate will descend to the heir of the releasee on the part of her mother, and the other moiety will descend to her heir on the part of her father. It should also follow that

But they cannot exchange with each other 'till partition. (*a*) *Touchst. 292.*

If there be two parceners, and they make partition by consent, they may release to each other their respective moieties, and there will be no necessity for a lease for a year (or bargain

if one of the daughters after the death of her mother and before the release makes her will and devises all her estate and interest in the land, the devisee will take only that moiety which the testatrix had at the date of her will, and not that which she subsequently acquires by the release; and in this respect a partition (which may be effected by mere agreement and makes no degree in the title) is essentially different, as will be presently seen. A republication of the will after the release would doubtless enable the devise to carry the entirety of the land, the words being "all the estate and interest of the devisor," but if the words be (as in *Luther* v. *Kirby*, 8 *Vin.* 148.) "all that my moiety" it is difficult to perceive how a republication could make the will operate on more than what it expressly states to be the subject of it, viz. *one moiety*.

(*a*) What have they to exchange? They are seised in moieties, and if they exchange each other's moieties they are still in the same situation. Suppose two farms, *A.* and *B.*, descend to two coparceners, *C.* and *D.*, and *C.* exchanges her moiety in farm *A.* for *D.*'s moiety in farm *B.*, and so *vice versâ*. By this process *C.* will become seised of farm *B.* and *D.* of farm *A.* in severalty. But this is a partition, not an exchange. It seems therefore true, as stated in the text, that there cannot be an exchange between coparceners until partition from the futility of the thing.

and sale), as the possession at the time of partition would be in each. (*a*)

(*a*) As the undivided estate of coparceners is cast upon them by act of law the severance of their interest was much favoured of old, and thence it was, that partition by *parol* was allowed. The third section of the statute of frauds, 29 *Car.* 2. c. 3. now requires that all parol agreements respecting the transfer of estates in land shall be reduced into writing and signed by the party to be charged therewith. A simple written agreement therefore made between persons free from the disabilities of infancy, coverture, &c. will be as effectual to sever the jointure as the plan usually adopted by lease and release.

An actual *conveyance* is not essential to the validity of a partition. The deed of partition is less than a grant. It does not operate by a fresh investiture of the seisin, for coparceners are already in the entire seisin by descent; it simply dissevers the unity of possession and makes no degree in the title. If the lands were derived *ex parte materna* they will still continue descendible in that channel, and a will made prior to the partition will remain in force notwithstanding a fine be levied to perfect the severance. 8 *Vin.* 148. 7 *Ves.* 558. As to the will, however, some few observations remain to be made. If a coparcener before partition devises "all her estate and interest in the land" *that* will carry all her interest in the allotment assigned to her on partition after the date of her will; for there is no new acquisition by the partition, and the testatrix will have been seised of the same estate at the respective times of making her will and of her decease. So if she devise "all that her *moiety* of 40 acres of land in *A*." and she afterwards receives 20 acres on partition as her share, the words of the will are sufficient to include the whole 20 acres, for that is her moiety in severalty. But if she devise all that her "*undivided moiety*" it is questionable whether those words will pass a "*divided entirety*,"

for *non constat*, that she meant to pass an estate in severalty by words strictly applicable to an estate in jointure, and it admits of doubt whether such a devise would not fail altogether for want of *evidence* of intention ; but some gentlemen conceive that the Will will be good as to one moiety of the lands received in severalty, and that the other moiety will descend to the testatrix's heir at law. The general rule is, "that if at the death of the testator there is no interest in him to answer the description in the will the devise cannot operate," *per* Lord Chancellor, in *Knollys* v. *Alcock*, 7 *Ves.* 565. But if two farms *A.* and *B.* descend to two coparceners *C.* and *D.*, and *C.* devises "all her estate and interest in farm *A.*" or "all that her moiety in farm *A.*" and on partition the entirety of farm *B.* is allotted to her, the devise is rendered nugatory by this partition, for want of applicability in the words of the will to the thing devised.

In *Luther* v. *Kirby*, 8 *Vin.* 148. 3 *Pr. Wms.* 169. (B.) *A.* and *B.* were tenants in common of the manor of Bemfleet and several farms and lands thereto belonging. *A.* made her will, and devised unto trustees, "all and singular her *moiety* of the said manor and lands." Afterwards *A.* and *B.* made partition by fine, (*B.* being a married woman,) and *A.* died without republishing her will, leaving a son who contested the validity of the will. Lord Chancellor King directed a case to be made for the opinion of the Court of King's Bench, whether the partition and fine revoked the will; the Judges certified, "that the will was not thereby revoked, but that the share of the said *A.* in the lands contained in the deed and fine, passed by her will to the trustees therein named." Peere Williams adds, "the Lord Chancellor concurred." The learned Author of Abstracts (adopting the argument of Sir James Mansfield when at the bar) considers it difficult to comprehend how the accessional share could pass by the anterior will. 2 *Abs.* 72. Sir James Mansfield puts this case : "If a person seised as a coparcener of an estate in *Surrey* and another in *Middlesex*, devises all his *undivided moiety* of the estate in *Surrey* to *A.*, and his *undivided*

moiety of the estate in *Middlesex* to *B.*, and afterwards on partition agrees to relinquish his interest in the *Surrey* estate, and to take the entirety of that in *Middlssex;* the partition, so far as it does not disturb his interest in the *Middlesex* estate, is no revocation, and the devise will take effect so far: but as to the *Surrey* estate it is gone; *and the additional interest acquired in* Middlesex *not being devised goes to his heir.*" 7 *Ves.* 561. The Court did not in direct terms deliver an opinion on this point; but said, that if by means of the partition the words of devise cannot possibly amount to a description of the thing, the will must be revoked. *Knollys* v. *Alcock*, 7 *Ves.* 565. In that case *A.* and *B.* were entitled to estates in *Berkshire*, *Lincolnshire*, and *Oxfordshire*, in coparcenary. *A.*, by will, dated June, 1795, devised "all her real estates in the counties of *Lincoln* and *Oxford*" to Alcock and his heirs; and "one full half of her undivided moiety of the *Berkshire* estate" to Martin, in fee; and "the other half part" to Longmire, in strict settlement. [The case is not very succinctly reported: but it appeared that, before the date of her will, the testatrix had executed a conveyance to Alcock of all her interest in the *Lincolnshire* and *Oxfordshire* estates, which by her will she distinctly confirmed. This conveyance was proved to be not merely voluntary but fraudulent; and Lord Rosslyn throughout his decree treats it as absolutely void: yet, with the concurrence of the heir, he seems to have considered this void conveyance as well confirmed by the will. 5 *Ves.* 649. 7 *Ib.* 560. Putting the conveyance out of the case, the devise stands as above stated.] In Nov. 1795, *A.* and *B.* entered into a written agreement for a partition, whereby it was agreed that *A.* should enjoy the *Lincolnshire* estate, and *B.* the *Berkshire* estate, in severalty; and that the difference in value between those two estates, whatever it might be, should be made up out of the *Oxfordshire* estate. It appeared that the *Lincolnshire* and *Oxfordshire* estates were but both equivalent to the *Berkshire* estate; and Lord Rosslyn therefore held, that as the testatrix, at the time of her death, had departed with all

interest in the *Berkshire* estate, Martin and Longmire took nothing by the said will. 5 *Ves.* 649. On petition of rehearing, Lord Eldon observed, that "if a partition is effected, either by compulsion or agreement, and the thing done is nothing more than partition, it is not a revocation; but the slightest addition to that purpose will make it a revocation; if parties will even introduce a power of appointment prior to the limitation of the uses, that very slight circumstance, as it would be considered if it were *res integra*, is sufficient, [but the descent it is presumed would not be altered thereby]: if coparceners have an estate in *Berkshire*, after partition that would be a moiety of the *Berkshire* estate, and it would pass by the will; but if it is made so that the words of the will cannot by possibility amount to the description of the thing, how can it not be a revocation? This testatrix at her death has no *Berkshire* estate; are the devisees to take an equivalent out of the *Lincolnshire* and *Oxfordshire* estates? I cannot say *that*, for this will does not operate upon the tenements in those counties. It seems, therefore, that taking it to be matter of partition, yet if the manner of it destroys the interest of the testator in the thing given, so that at his death there is no interest in him to answer the description, the devise cannot operate; as to the particular point, what Martin and Longmire take by the will, I cannot think that Lord Rosslyn's decree has miscarried upon *that;* the decree must be affirmed." *Knollys* v. *Alcock*, 7 *Ves.* 566.

CHAPTER XI.

OF AN ESTATE IN JOINT-TENANCY.

2 Bl Comm. 179. Litt. b. 3. c. 3.

JOINT-TENANTS always take *by purchase*; (*a*) and the proper and best mode of creating an estate in joint-tenancy is to limit "to *A. B.* and *C. D.* and their assigns," if it be an estate for life; or "to *A. B.* and *C. D.* and their heirs," if in fee (*b*) The limitation sometimes

Bull. (1) to Co. Litt 191 a. n. 61.

(*a*) And there may be a joint-tenancy for life or in fee, but not in tail; unless the donees being male and female may lawfully intermarry. As if an estate be limited to two brothers, and the heirs of their bodies; if this were a joint-tenancy, then in the event of one brother dying leaving heirs of his body, the whole would go over to the survivor, in direct opposition to the terms of the limitation; but the statute *de donis* has ordained that the will of the donor be implicitly observed; and, therefore, a limitation as above has been construed to give the donees estates for life in joint-tenancy with several inheritances in tail. *Dyer* 326. *Co. Litt.* 184 a.

(*b*) The invariable rule at law is, that when lands are conveyed to two or more persons without any modifying or disjunctive words, they take as joint-tenants. The rule is the same in equity, but it there admits of exceptions. "If two people join in lending money on mortgage, equity says, it could not be the intention that the interests should survive; though they take a joint security, each means to lend his own

made "to *A. B.* and *C. D.* and *the survivor of them, and the heirs of such survivor,*" is objectionable, as, if there be nothing to controul the

1 Fearne, 283.
3 Anstr. 886.
Cro. Car. 102.

and take back his own." *Per* Lord Apsley, 3 *Ves.* 631. S. L. 2 *Ves.* 258. The consequence is, that though the entire legal estate is in the survivor, yet the personal representatives of the deceased mortgagee are necessary parties to a reconveyance, in order to obtain a discharge of their share of the mortgage money; and, until the money be repaid, the surviving mortgagee is, in equity, a trustee for the personal representatives of his deceased companion. *Carth.* 16. Hence it is necessary, when trustees advance money on mortgage, to add a clause making them joint tenants of the money as well as of the estate. If the mortgage be foreclosed, or the mortgagees purchase the equity of redemption, and take a conveyance, without dissevering words, equity still holds them to be tenants in common according to their proportions in the money, although the legal estate be held by them in joint-tenancy, unless by express stipulation the contrary is provided for. *Pr. Ch.* 332. 2 *Ves.* 258. When trustees advance money, it is proper to limit the estate to them in joint-tenancy, with a declaration that they shall be joint-tenants in equity: but when two persons advance money on mortgage in equal shares, it is a desirable object to give them distinct and descendible interests in the land. For this purpose the usual words of severance should be added; or an aliquot part of the estate, equal to the sum advanced by each mortgagee, may be limited to each for a term of years, with cross remainders between them in fee. This plan is mentioned by Mr. Coote in his Treatise on Mortgages, p. 110; but he does not point out any particular advantages resulting from it, further than as it keeps the mortgagees on an equality, and yet gives them distinct liens on the whole estate.

Another exception in equity is, that when two persons pur-

legal operation of the terms, they would give *a contingent remainder to the survivor.* (*a*)

chase an estate, and advance the purchase money in *unequal proportions*, they are deemed to be tenants in common, although the conveyance may be made to them generally, provided the inequality of the consideration be apparent on the conveyance. If they advance the money in *equal shares* and take a conveyance generally, a court of equity has nothing whereon to ground an inference that this was not a joint-purchase of the chance of survivorship, and they will be held to be joint-tenants accordingly; but if one of such joint-tenants lays out considerable sums in repairs and improvements, he will be held to have a lien on the land for the sums so expended. *Lake* v. *Gibson*, 1 *Eq. Ca. Abr.* 291. 1 *Vern.* 217. 3 *Pr. Wms.* 168. Wares, merchandize, and stock in trade, belonging to joint-merchants or partners, survive to the representatives of the deceased partner; the rule being *jus accrescendi inter mercatores locum non habet.* So, if a freehold shop or warehouse be conveyed to merchants or partners in trade, it is conceived that in equity they will be tenants in common, and that the survivor will be held to be a trustee of the legal estate, as to one moiety in trust for the personal representatives of his deceased companion.

(*a*) And as such contingent remainder continues without an owner till the period prefixed for its vesting, it cannot be conveyed; for being without an owner it cannot have a grantor: but it may be destroyed in two ways,—first, by forfeiture of the particular estate which supports it; and, secondly, by the expectant owner's levying a fine *come ceo*, which will operate as an extinguishment of the *right* to succeed to the remainder: and the effect of both species of destruction is to accelerate the reversion (or rather the possibility of reverter) in the donor's heir at law into an estate in

In the creation of a joint-tenancy it is not only necessary that the estate to the several persons *be limited by the same deed*, but the estate in them must *vest at one and the same time;* for if an estate be limited to *A.* for life, with remainder to the heirs of *B.* and *C.* (*B.* and *C.* being supposed to be living,) and *B.* die *during the particular estate*, when one moiety would vest in *his* heirs, and afterwards *C.* die, *in the life-time of A.* when the other moiety would vest in his heirs, the heirs of *B.* and *C.* would take in common.

See *Co. Litt.* 188. a. & n. (13.) & 1 *Fearne*, 460. &c. (4th ed.) 239, (3d ed.)

But if the estate be limited *by way of use* it would be otherwise; as the estate would be in the trustee *'till* the uses arise; and *as* they arise the *cestui que use* shall be in by the original feoffment or deed. (*a*)

possession. By the concurrence therefore of the tenants for life, the contingent remainder-men, and the settlor's heir at law, the estate may be discharged of the contingency, and a good conveyance of the fee-simple made, but not without. *Buckler's case*, 2 *Co.* 56 a. *Weale* v. *Lower*, *Poll.* 54. *Davies* v. *Bush*, 1 *M'Lel. & Yo.* 58. The practical deduction is that in limiting estates to trustees, the devise or conveyance should be, "to and to the use of the trustees their heirs and assigns," but *powers* should be limited to trustees "and the survivor of them his heirs or their or his assigns." 1 *Barn. & Ald.* 608. 3 *Madd.* 272.

(*a*) The above distinction may be exemplified thus:— Habendum to *J. S.* and his heirs, to the use of *A.* for life, with remainder to the heirs of *B.* and *C.* On *A.'s* death, *B.* and

1 Vent. 78. Cro. Jac. 696. As joint-tenants are as to all purposes (*a*) seised *per mie et per tout* they cannot grant nor *bar-*

C. being dead, their heirs take as joint-tenants, though *B.* and *C.* died at different times. But if the habendum had been to and to the use of *A.* for life, with remainder to the use of the heirs of *B.* and *C.*, then as the parties would be in by the common law, there being no person to stand seised to the uses, the legal estate in each moiety will vest at different times—supposing *B.* and *C.* to die at different periods, and so the heirs will become tenants in common. But it may be questioned, whether in the case of a conveyance to uses, the contingent remainder does not become vested in the heir of *B.*, on his death living *C.* A forfeiture of the particular estate, after the death of *B.*, in the lifetime of *C*, would not, it is apprehended, destroy the contingent use as to the entirety, but only as to the moiety which is limited to the heir of *C.*; yet if the heirs of *B.* and *C.* are joint-tenants, one moiety should not vest in the heir of *B.* until the heir of *C.* is ascertained. The distinction in the text is not very intelligible. By the occurrence of the word "trustee" it is possible the learned author might have had in contemplation *trust estates*; as applied to which his position is perfectly correct: or he might have had in view a gift to unborn children after a life-estate to the parent, in which case, on the birth of one child, the whole fee vests in him; and, on the birth of another child, he and his brother or sister take as joint-tenants; and so of all the children born or in *ventre sa mere* at the death of the tenant for life: but a limitation to the heirs of two different persons could not it is apprehended operate so as to vest the *whole* in the one which is first ascertained, subject to open and let in the other heir on the death of his ancestor.

(*a*) It is scarcely correct to say that joint-tenants are seised of the whole to all purposes. If *A.* and *B.* are joint-tenants of 100 acres, *A.* may deliver seisin of 50 undivided acres to

gain and sell, nor *surrender,* nor *devise,* (*a*) to *each other;* nor can they *exchange with each other;* nor can one of them *enfeoff his companion.*

1 *Vent.* 78. *Cro. Jac.* 696. *Perk. S.* 586, 7. *Touch.* 303. *Powell on Dev.* 174. *Touch.* 292. *Gilb. Ten.* 73—71.

C. without the concurrence of *B.*, which shews that joint-tenants are not for the purposes of alienation seised *per tout*, but only *per my*. Lord Coke says, they are seised "*totum conjunctim et nihil per se separatim*;" but for the purposes of forfeiture and alienation are they not seised of a moiety *separatim*?

(*a*) We have seen that a partition by a coparcener is not a revocation of his prior will, but as a joint-tenant has no devisable interest while the jointure continues, a partition of his interest will not have any effect on his prior devise; by republication however of a joint-tenant's will after partition, it may be made to embrace the purparty derived by partition if the words are ample enough to comprise the estate. *Swift* v. *Roberts*, 3 *Burr.* 1496. If a joint-tenant devise "all his estate and interest" in the lands in jointure to *A.* and then his companion dies whereby he becomes entitled to the whole, this Will will be entirely inoperative unless it be republished after the survivorship has accrued. Hence it should appear that the estate in the hands of the survivor is viewed as a *new acquisition*, and it is so in fact to all purposes except as regards a lease for years. All charges by a joint-tenant are void as against his surviving companion, and they are void as against himself being the survivor, except they can attach on the estate in some other way. The lien of a judgment may be said to be in expectancy during the jointure. If it be against the joint-tenant who survives, then it attaches on the land in severalty in the usual course. If it be against the deceased joint-tenant, then as against the survivor it is altogether nugatory. 6 *Co.* 78. *Co. Litt.* 184 *a.* An equitable mortgage by one joint-tenant would amount to an equitable severance of the jointure

But each may sever the tenancy at his pleasure by granting his portion over to a stranger, either to the use of such stranger or to the use of himself, by the usual mode of conveying a freehold, (*a*)

and prevent a survivorship. So at least the law is understood from cases presently mentioned, but the point is not supported by any exact judicial determination. At law a mortgage by a joint-tenant for years is an entire severance of the jointure, whether it be of all his interest in the term or by way of underlease. *Co. Litt.* 192 a. But a mortgage by demise by a joint-tenant of the fee would not, it is conceived, work a severance of the jointure in the freehold, as a lease is neither a severance nor a suspension of the jointure; vide next note. As a further consequence of the right of survivorship an estate in joint-tenancy is not subject to dower or curtesy. *Co. Litt.* 30 a. 37 b. 183 a. If therefore one or both of the joint-tenants alien during the jointure their respective wives will not be entitled to dower.

(*a*) If one bargains and sells all his estate and interest in a particular farm, and his companion dies before the bargain and sale is enrolled, whereby the bargainor at the time of enrolment is seised of the whole farm, yet the bargainee shall only hold a moiety in common with the heir of the deceased joint-tenant, as the bargain and sale severed the tenancy at the time of its execution. *Co. Lit.* 186 a. If one joint-tenant in fee grants his moiety to a stranger for life, this is a *suspension*—not a *severance* of the jointure. After the death of the lessee the jointure revives, if the joint-tenants are living: during the life of the lessee, he and the other joint-tenant are tenants in common. If either joint-tenant dies during the suspension, his heir will be entitled to his moiety, for during the suspension the inheritance is severed. Lord Coke treats the inheritance during suspension of the freehold as in reversion, but it is not wholly in reversion—one moiety of it is in possession. *Co. Lit.*

or compel a partition, by statute; or one may *release to his companion.* (*a*)

191 b. 192 a. A lease for years by one joint-tenant to a stranger works neither a severance nor a suspension, but it passes only a moiety of the estate though it purport to embrace the whole; and although the lessor should afterwards become the survivor, or obtain the entirety by release, a moiety only will be leased. *2 *Roll. Abr.* 89. 2 *Pres. Abs.* 63. If the jointure continues to the time of the death of the lessor, the surviving joint-tenant will be bound by the lease as to the moiety comprised in it, but he will be entitled to the rent as incident to the reversion. *Harbin* v. *Hoby*, Noy. Rep. 157.

(*a*) In this release the releasee is already supposed to be in the tenancy by the feudal contract which created the jointure, and the release operating merely as a discharge of the benefit of that contract from the one joint-tenant to the other, the addition of words of inheritance in the release cannot be necessary, as the releasee has the inheritance already by the former conveyance, supposing that to be in fee. Hence a release from one joint-tenant to his companion does not make a *degree* in the title, it operates more by *mitter le droit* than *mitter l'estate*. *Co. Litt.* 273 b. and n. 2. But though this release will, for all purposes of conveyance, pass the moiety of the releasing joint-tenant to his companion, yet the usual practice is to take a conveyance by lease and release. If this mode be adopted, it may be thought that a degree in the title is formed; for as one joint-tenant may make a lease for years of his moiety to his companion, (*Co. Litt.* 186 a.), a release afterwards should operate by way of enlargement of estate; and if so, it is clear that a degree would be formed and the descent changed. But a lease for years does not completely sever the jointure of the freehold, and the foregoing remarks as to the unity of the feudal contract remain unaffected by the bargain and sale for a year.

But joint-tenants may *exchange with a stranger*, or *surrender to the immediate reversioner*. (*a*)

(*a*) Joint-tenants have an unity of possession, consequently, the entry and seisin of one is the entry and seisin of all. 6 *Mod.* 44. 1 *Inst.* 49 b. Hence it is inferred, that a lease and release delivered to one of several grantees, will vest the legal interest in all; and, that the death of one of the grantees before the execution of the conveyance will not prevent a survivorship. From these deductions, advantage has been taken in practice, in conveying an estate to a person who is out of the kingdom. The plan is, to convey to him and another person within the kingdom, "nevertheless, as to the estate and interest of the latter, in trust for the former;" so that if the person abroad should happen to be dead at the time of the execution of the conveyance, the entire legal estate will survive to his trustee. If this device were not adopted the conveyance would be void and the trouble and expense of a second conveyance and search for judgments would be incurred.

In perusing abstracts it sometimes occurs under the old uses to bar dower, that an attendant term is assigned to the trustee of the fee in joint-tenancy with the purchaser. A question then arises, whether there is a merger of the term. It is apprehended, that there is a merger of the whole term, and not merely of a moiety of it, for as each joint-tenant is seised of the entirety, there is a legal union of the whole term and entire fee in one and the same person, at one and the same time, in one and the same right. A distinction seems to be taken by Lord Coke between a surrender and a grant in this respect. He is understood to say, that if a lessee for life *surrender* to one of two joint-tenants of the reversion, this shall enure to them both; but if a lessee for life *grant* to one of two joint-tenants of the fee, the grantee shall take a moiety in fee, and as to the other moiety, he shall have an estate *pur auter vie*, with remainder to his companion in fee. *Co. Litt.*

192 a. b. 214 a. The reason may be, that livery of seisin is necessary to pass the particular estate in the latter instance, and that, therefore, the grantee must enter of a different estate to that which he before possessed in joint-tenancy, and so an essential unity of the jointure will be destroyed and the tenancy consequently severed, whereas livery of seisin is not necessary to a surrender. *Thompson* v. *Leach*, 2 *Salk.* 618. An assignment of a term of years to the immediate reversioner cannot operate in any other way than by surrender, and consequently a severance of the jointure in reversion will not be thereby effected. 3 *Prest. Conv.* 153. We have seen that a lease for life by one of two joint-tenants is a severance during its existence, because of the livery (*ante*, p. 146.); and the acceptance by one of two joint-tenants of a conveyance of a similar estate should, for the same reason, operate in a similar way. But a lease for years is not a severance of the jointure; neither, therefore, should the acceptance of such a lease be a severance.—*Each* joint-tenant is *seised* of the whole estate, consequently an assignment to one should operate as an entire merger. If it be contended, that a moiety only of the term is merged, it is fair to inquire how the other moiety is situated. Is it vested in the trustee with remainder to himself and purchaser in fee? If so, then a merger of a moiety of that moiety would ensue, and so inversely till the whole term is gone. Taking it, therefore, either way, the term seems to be merged. But a doctrine so refined cannot be confidently relied on; and it is principally to be resorted to to assist the presumption of a merger or surrender of an old term which has lain dormant for a considerable time.

It is also observable, that a joint-tenant cannot grant his chance of survivorship to a stranger so as to bind himself by estoppel. 4 *Barn. & Ald.* 309. If a joint-tenant *for life* grants to a stranger, this is a severance of the jointure, and the stranger takes an estate for the life of the grantor in one moiety in common with the other joint-tenant, who is reduced to an estate for his own life in the other moiety. This consequence

may be evaded by a declaration of trust, preserving the legal estate in joint-tenancy. So if two joint-tenants for life join in conveying "all their estate and interest" to a stranger, it should follow that this would likewise be a severance of the joint-tenancy, and confer on the grantee an estate in moieties for the respective lives of the grantors. If, instead of a joint conveyance, each joint-tenant had conveyed by a separate instrument, it is clear that the stranger could not have held the *whole* for the life of the survivor, and there is nothing in the *joint* conveyance to work a different construction. In a late case, a copyhold estate was surrendered to *A.* and his wife for their natural lives *and the life of the longer liver of them.* They afterwards conveyed to a purchaser in general terms, and a question arose whether that conveyance passed more than an estate for their *joint lives.* The Court of King's Bench held that the purchaser took an estate for the lives of *A.* and his wife, and the *survivor* of them. *Doe* v. *Wilson*, 4 *Barn. & Ald.* 311.—It will be observed, that this is the case of a tenancy by entireties, and therefore, in many respects, distinguishable from a joint-tenancy. As to the latter, if an estate be given to two persons, not being husband and wife, "for their lives and the life of the survivor," it should at first sight appear, that they take a joint estate for their joint lives, with a contingent remainder to the survivor for life by *express* limitation; but the law implies just what that limitation dictates, as will be evident from a little consideration, and the rule is, that the expression of that which the law implies is without operation. Thus in a gift to two persons for their lives without more, they become joint-tenants for lives, and on the death of one the whole remains to the survivor; to add, therefore, a limitation to the survivor in a gift of a joint-tenancy for lives, is but to express what the law implies: such addition, consequently, is nugatory and void.

The limitation to the longer liver must be treated as surplusage, and then the gift is to *A.* and his wife simply, which is a very near approach to a joint-tenancy for lives. But there is a material distinction between a joint-tenancy and

a tenancy by entireties. Joint-tenants are seised *per my et per tout;* tenants by entireties are seised not *per my*, but *per tout* only. The consequence is, that if the husband and wife convey to a stranger, as to the husband the conveyance operates to pass the entirety; and as to the wife the conveyance operates to pass the entirety; so that whether the husband or wife be the survivor, the grantee has the entirety by *conveyance* from that survivor. With respect to joint-tenants, a difference is instantly perceptible. For the purposes of forfeiture and alienation they are seised *per my*—for descent and tenancy *per tout.* A conveyance by two joint-tenants for life to the same grantee operates as to one joint-tenant to pass a moiety for the life of that grantor only, and as to the other joint-tenant, it operates to pass his moiety for his own life only. On the death of one, the reversion as to a moiety falls in, and the grantee holds the other moiety only for the life of the surviving joint-tenant. Hence it is submitted, that the case of *Doe* v. *Wilson* does not govern the position proposed respecting the separate operation of a joint conveyance by two joint-tenants for lives.

To confine an estate for lives to the joint lives of the donees, the gift must be expressly to them for their joint lives, and then on the death of one the estate will cease; and it may be proper to observe, that in the case of a gift to two persons and the survivor of them, *and the heirs of such survivor*, they take as joint-tenants for lives, with a contingent remainder to the survivor in fee. The words in italics are not implied by law, and are consequently not surplusage.

A covenant or agreement by a joint-tenant to *sell* creates an equitable severance of the jointure, and will be enforced in equity against the survivor. 2 *Vern.* 63. 2 *Ves. sen.* 634. 3 *Ves.* 257. Mr. Preston, however, considers it questionable, whether the contract will be enforced *against the survivor*, but on what grounds does not appear. 2 *Abs.* 67. If the contract be an equitable severance (and that it is so all the books agree), it seems strange to say, that it shall be enforced against the contracting party himself, and not

against the survivor. A contract is more than a mere lien or charge, it confers an estate executed, on the rule, that what is agreed to be done, is in equity considered as actually performed; and a contract to levy a fine by a tenant in tail does not seem to be in *pari materia*, as such a contract is not deemed of any efficacy against the issue in tail, from the peculiar wording of the statute *de donis*.

Judgments and crown debts against a deceased joint-tenant do not affect the estate in the hands of the survivor, but if a joint-tenant aliens so as to sever the jointure, or if he becomes the survivor or sole owner by release, prior judgments against him become available charges on the property. *Litt.* s. 286. 6 *Co.* 78. So of dower and curtesy. *Co. Litt.* 30 a. 183 a. But the surviving joint-tenant is entitled to emblements, if the jointure continues up to the death of one of them. 2 *Vern.* 323.

CHAPTER XII.

OF A TENANCY IN COMMON.

TENANTS in common take also *by purchase*, but hold by distinct titles, and have *separate freeholds*, being not seised *per mie and per tout*, as joint-tenants are:(*a*) and the best way to create a tenancy in common is either to limit one moiety of the premises expressly to one, and the other moiety to the other, or to use the words "to hold as tenants in common and not as joint-tenants;" as the law may otherwise construe it a joint estate.(*b*) 2 *Bl. Comm.* 191. *Litt. b.* 3. c. 4. and the *Comment.*

(*a*) They have also separate inheritances as distinct from each other as several tenants. Therefore a lease by two tenants in common operates as a distinct lease as to each of them. *Co. Litt.* 45. 200. If two tenants in common in fee grant a rent charge of 20*s*., the grantee will have two rent charges of 20*s*. each, one out of each moiety, and no words expressive of a contrary intention will prevent this effect. 5 *Co.* 7. To do *that*, they should join in a conveyance to *A. B.* and his heirs, to the use intent and purpose that the annuitant might receive one rent charge of 20*s*. out of the lands thereby released.

(*b*) In a will the words "equally to be divided"—"equally between or to them"—"equally" alone—"respect-

Touchst. 292. As the possession of tenants in common is undivided 'till partition, they *cannot exchange with each other*, though they *may* exchange, either together or separately, *with a stranger*.

Gilb. Ten. 74. But as the seisin of each is distinct, and their estates several, one may *enfeoff* the other; or, if the other have a greater estate, *surrender to him* So one may *devise* his part to the other:

ively"—"rateably"—"share and share alike," and words of a similar distributive import create a tenancy in common. 2 *Vent.* 366. 1 *Vern.* 32. 1 *Lev.* 232. *Styles*, 434. *Salk.* 226. *Het.* 29. *Cowp.* 657. 1 *New Rep.* 82. 3 *Ves.* 260. 2 *Ca. Chan.* 56. 2 *Atk.* 121. 2 *Meriv.* 70. 2 *Bing.* 151. A deed operating by virtue of the statute of uses is construed in the same manner; but those words in an instrument taking effect by the common law, will give a joint-tenancy. Thus, a feoffment to and to the use of two persons and their heirs equally to be divided between them, will give the feoffees an estate in joint-tenancy, because the use and the seisin being to the same persons, the statute does not operate, and the parties are said to be in by the common law. But if the feoffment had been to *A.* and his heirs, to the use of *B.* and *C.* and their heirs to be equally divided between them, *B.* and *C.* would have been tenants in common. This distinction, however, is far from settled, and the inclination of the Courts at the present day seems to be to construe the words "equally to be divided" as conferring a tenancy in common in all cases. See 1 *Watk. Cop.* [113]. 144. *4th ed.*, and the cases cited in the notes there. Real estate purchased with partnership property is, to all intents, considered in equity as held in common, though the conveyance may have been to the partners in joint-tenancy 3 *Eden. Bro. C. C.* 200.

but one cannot *release* to his companion, as such. (*a*)

Tenants in common may transfer their respective shares *to strangers* by the usual modes of conveying freehold property ; and they may compel a partition among themselves. (*b*)

(*a*) Because such release must operate by way of enlargement, and there is no estate in the companion in the share of the releasor to be enlarged.

(*b*) Compulsory partitions are now usually effected by commissions out of chancery, which are granted of right and perfected by reciprocal conveyances, by which means alone an amicable partition of all joint estates may be effected; and an agreement in writing to make a partition will have the same effect in equity. The commission is most common when there are particular estates and reversions in one or both moieties, as then all parties are bound by it if it be made pursuant to the requisitions of the statutes, 31 Hen. 8. c. 1. & 32 Hen. 8. c. 32. But the only mode of making an effectual partition where one of the parties is an infant is by act of parliament. Under the general inclosure act (41 Geo. III. c. 109. s. 16) the commissioners have power to allot in severalty all the old inclosures and new allotments held in joint-tenancy, coparcenary, or in common within the parish, whether the parties are adult, infant, lunatic, or covert.

OF A TENANCY BY ENTIRETIES.

WHERE an estate is conveyed or devised to a man and his wife *during coverture* they are said to be tenants by entireties, that is, each is said to be seised of the *whole estate* and neither of a part. The consequence is that the husband's conveyance alone will not have any effect against his wife surviving. The husband being seised of the whole estate during coverture either in his own right or *jure uxoris* can of course depart with that interest, but to make a complete conveyance of all the interest held in entirety the wife must concur, and being under coverture she must join in a fine, so that no estate by entireties can be severed or conveyed without fine, if it confer a right to the freehold. Joint-tenants are seised *per my et per tout*. Tenants by entireties are seised *per tout* only. *Co. Litt.* 326. 3 *Co.* 27 b. 8 *Co.* 72. Under a joint-tenancy one moiety merely survives, the surviving joint-tenant being already seised of the other moiety. Under a tenancy by entireties there is in fact no survivorship, as the whole is in each tenant during coverture as much as it is in the survivor after it has ceased. The survivor takes the whole by original limitation and not by the occurrence of a subsequent event. But although there is in fact no survivorship the effect is that the surviving husband or wife takes the whole estate, not as a new acquisition but as an estate freed from participation in by another. The consequence it is presumed is, that if the husband makes his will and survives his wife, the Will will be good without republication, which we have seen would not be the case if he were a joint-tenant,

ante p. 145. And it should follow that if tenants by entireties for life join in a conveyance to *A. B.* he will take the whole for the life of the survivor; a point which has been so decided in *Doe* v. *Wilson*, ante p. 150. This species of tenancy seems to be an exception to the rule that the husband and wife are one person in law; if they are to be considered as one person, the husband should be able to convey alone, which he is not enabled to do.

As a consequence of this peculiar tenancy if a grant be made to three persons, two being husband and wife, the husband and wife take one moiety, and the stranger the other moiety; as between themselves they hold in joint-tenancy, but to enable the stranger to take by survivorship he must survive both the husband and wife, so that he has one chance against two. The husband and wife hold their moiety as tenants by entireties, but though the husband has the freehold during coverture, he and the stranger cannot make a valid lease to bind the wife surviving; to effect *that* she must join in a fine. A gift to a man and woman who afterwards intermarry does not make them tenants by entireties. They are joint-tenants both before and after marriage, and the husband alone may in that case create a severance by aliening his moiety; and it should be observed, that if a husband and wife hold a term for years as tenants by entireties, the husband alone may assign the term so as to bind his wife surviving. *Co. Litt.* 187 b. 356. 1 *Pres. Conv.* 55. 155. 2 *Abs.* 39.

CHAP. XIII

OF A REMAINDER

2 Bl. Comm 164. 1 Fearne. [Co Litt 19 a. 143 a.] A REMAINDER is that portion of interest which, on the creation of a particular estate, *is limited over to another.*

See 3 Atk. 138. Remainders are either *vested* or *contingent;* a *vested* remainder is that *which is limited, or is transmitted, to a person who is capable of receiving the possession should the particular estate happen to determine;* as to *A.* for life, remainder to *B.* and his heirs: here, as *B.* is in existence, he is capable (or his heirs if he die) of taking the possession whenever *A.*'s death may occur.

A *remainder* is *contingent* when *the particular estate may happen to determine before the person to whom the remainder is limited can take the possession;* as to *A.* for life, with remainder to the right heirs of *B.* Now, during *B*'s life the remainder *is contingent,* as he cannot have an heir till his death; and, therefore, should *A.* die before *B.* there could be no one to take the possession.

In the creation of remainders the following rules must be observed:

1st, There must be a present, or particular, *estate* (*a*) created, which, if the remainder be a *vested* one, must be, at least, *for years;* or, if the remainder be *contingent,* must be an *estate of freehold;* as a freehold cannot commence *in futuro* by the common law. (*b*)

(*a*) Such estate however need not be in the actual seisin or possession of the particular tenant: it is sufficient that it confer a right to the possession, for while a right of entry remains, there can be no doubt that the same estate continues, since the right of entry subsists only in consequence of the existence of the *estate;* but when the right of entry is gone, and nothing but a right of action remains, it then becomes a question in law whether the same estate continues or not, for the action is nothing more than the means of deciding this question. *Fearne* 286, *7th Ed.* Hence an *interesse termini* should be a sufficient support to a vested remainder, as *that* is something more than a right of entry—being assignable, and an interest which will prevent a merger, but it does not come up to the character of an *estate,* as was adjudged in the late case of *Doe* v. *Walker*, 5 *Barn. & Cress.* 111. An estate at will cannot support a freehold remainder, because entry to deliver seisin to the remainder-man would be a determination of the will. *Dy.* 18 b. 5 *Bac. Abr.* 822.

(*b*) The student should distinctly mark the difference between a remainder commencing under a conveyance at common law, and a remainder commencing under a conveyance to uses. If a feoffment be made direct to *A.* for years, with remainder to *B.* in fee, livery is made to *A.* which instantly enures

to *B.* The freehold passes out of the feoffor, and vests immediately in *B.*—This therefore is not an instance of the commencement of a freehold *in futuro.* But if the feoffment had been to *A.* for years, with remainder to the right heir of *B.* (he being living), there is no one in whom the freehold can vest. Livery may be made to *A.*, but as it cannot pass on to the remainder-man (he being unascertained), nor be retained by *A.* himself (such a retention of the freehold being incompatible with his estate for years), the livery operates nothing, and the freehold is not passed out of the feoffor, so that the feoffment is void as a conveyance of the freehold; but being by deed under seal, it will enure as a good lease for the term. If, however, the feoffment had been to *A.* and his heirs, to the use of *B.* for years, with remainder to the right heir of *C.*, here the whole seisin in fee passes out of the feoffor into *A.* the feoffee, and the statute executes the use in *B.* for the term of years; and then a resulting use arises to the feoffor and his heirs till the contingent estate vests in the right heir of *C.* Such at least is the deduction from principle: but the cases do not go to the full extent of this position. At first sight, indeed they appear contradictory (1 *Sand.* 142, 3. *4th Ed.*): but upon consideration it is submitted, that they will be found not to oppose, if they do not support, the doctrine here advanced. In *Adams* v. *Savage*, 2 *Lord Raym.* 854, the limitation of the term was to the feoffor himself, which negatived a resulting use to him of the fee; and in the case of a devise to *B.* for years, with remainder to the right heir of *B.*, this is a clear executory devise, and the fee in the interim, till the right heir is ascertained, descends to the testator's heir at law (*Harris* v. *Barnes*, 4 *Burr.* 2157. *Gore* v. *Gore*, 2 *Pr. Wms.* 28), which is much the same case as the above limitation in a deed. In the event of a determination of the term pending the contingency, it is conceived that the contingent remainder would still be supported under the doctrine of resulting use; for if the term had not been limited, it is clear that the feoffor would have retained the fee till the contingency happened, and the introduction of a term cannot

make any difference. If the limitation can be construed to mean, "to the use of the right heir, provided he be ascertained during the term," then, in the event of a determination of the term pending the contingency, the remainder to the right heir must fall to the ground; but as that proviso is not expressed, it is assumed that it cannot be implied, as there is nothing on the declaration of use to lead to such a conclusion. It should, however, be observed, that the limitation in this case to the right heir, is not strictly a remainder but a shifting use—when the heir is ascertained, then it becomes a remainder, if the particular estate be not determined.

It is said in some books, that if the contingent remainder be for years, a particular estate for years will be sufficient to support it.—A little reflection will shew, that this observation is inapplicable to chattel interests. If a lease be made to *A.* for forty years if he shall so long live, and after his *death*, to *B.* for one thousand years, *B.* takes an *interesse termini* and not a remainder. *B.*'s term will take effect although *A.*'s term should expire in his life-time. They are two substantive independent terms, which arise and take effect according to the periods of their limitation without reference to each other. The second term does not require any particular estate to support it. The reason requiring a particular estate of freehold to support a contingent remainder in *fee*, does not apply to a contingent remainder of a term, which may be made to commence *in futuro*. In short, as the Court of Common Pleas observed in *Corbet* v. *Stone*, "*there cannot be a contingent estate for years.*" *T. Ray.* 151. A limitation which as to freeholds creates a contingency, will, as to estates for years, give a vested interest. Thus a feoffment to *A.* for life, and after his *death* to *B.* in fee, *B.* takes a contingent remainder. *A.*'s estate for life may determine before his death, and then the remainder (not being ready to vest) will fall to the ground for want of a particular estate to support it. But if a lease be made to *A.* for forty years if he shall so long live, and after his *death* to *B.* for one thousand years, *B.* takes an *interesse termini* which is certain of being executed into estate

2dly, The particular estate and the remainders must be created *by the same deed.* (*a*)

3dly, The remainder must vest in the grantee during the particular estate, or the very instant it determines (*b*)

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on the death of *A.*, and which, therefore, cannot be said to be *contingent.*

(*a*) A will and codicil as they take effect at the same time, and are perfected by one and the same act, may be fairly denominated one and the same instrument. In a case of the late reign, an estate was devised to the heirs male of *J. S.*; and, in a schedule annexed to the will, the testator referred to the estate as being given to *J. S.* for life. The Court of King's Bench held, that *J. S.* took an estate for life by implication, with which the limitation to his heirs coalesced, and gave him an estate tail male, barrable by recovery, although the testator had attempted to make the estate tail inalienable. *Hayes* v. *Foorde*, 2 *W. Black.* 698. If an estate be conveyed to *A. B.* and his heirs, to the use of *C. D.* for life, with remainder to such uses as *E. F.* shall appoint, and *E. F.* appoints to *G. H.* in fee, *G. H.* has a remainder dependant on the particular estate of *C. D.* *Fearne*, *C. R.* 74. *7th Ed.* But if an estate be devised to *C. D.* in fee, after next Michaelmas, the fee descends in the interim to the testator's heir at law, and *C. D.* takes nothing; though some have thought that the heir takes an estate for a term with remainder to *C. D.* in fee. This construction, however, cannot be supported, as is ably shewn by Mr. Butler, in his note to *Fearne's C. R.* p. 1.

(*b*) If an interval intervene between the determination of that estate, and the vesting of the remainder, the remainder will be void,—*ab initio*, if the interval be certain at the time

4thly, And, if the remainder be contingent, it must be limited to some one that may, by common possibility, or *potentia propinqua*, be *in esse* at or before the determination of the particular estate. (*a*)

2 *Hen. Blackst.* 358. Proctor *v.* Bishop of Bath and Wells.

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the remainder is created; but *sub modo* only, if the interval occur at the time of the determination of the preceding interest. Thus if an estate be granted to *A.* for life, with remainder after his death and *one day* to *B.* in fee, this remainder is void in its inception; but if the grant be to *A.* for life, with remainder to *C.* after the deaths of *A.* and *B.*, this remainder is good in its limitation, but may become void in event. If at *A.*'s death *B.* be living, then as the remainder cannot vest in *C.* till *B.*'s death, there will be an indefinite interval of time, during which the remainder to *C.* will have no particular estate to support it; for want of that support the remainder will fall to the ground, by the first rule above-mentioned. *Et vide Mogg* v. *Mogg*, 1 *Meriv.* 654.

(*a*) In the case stated in the margin, *A.* devised an advowson to the first or other son of *B.* that should be bred a clergyman and be admitted to holy orders, in fee; but in case *B.* should have no such son, then to *C.* in fee. The Court was clearly of opinion, that the devise to the son of *B.* was void, from the uncertainty as to the time when such son, if he had any, might take orders; and that the devise over to *C.* was also void. This it will be observed is the case of an executory devise; but a contingent remainder must, it is conceived, be *in pari materia.* A contingent remainder, or shifting use, limited in the above-words, would doubtless be held void, as tending to a perpetuity. No clergyman can be admitted to holy orders till the age of twenty-four, so that in reality it is a limitation for a life in being (namely, *B.*), and

By the feudal law, the freehold could not be vacant, or, as it was termed, *in abeyance*. There

twenty-four years afterwards, which is contrary to the general rule mentioned in the next Chapter.

5th, If a condition be annexed to a particular estate, making it void in a given event; and a remainder be limited to take effect, not only on the determination of the particular estate, but on the destruction of that estate by the operation of the condition, the remainder is void in its creation. It is a rule at common law, that a stranger shall not take advantage of a condition, but only the grantor or his heirs. This rule would be contravened, if the above mode of limiting a remainder were allowed; for the right of entry on breach of the condition, would in that case be in the remainder-man, instead of the grantor or his heirs: besides, such a mode of limitation is incompatible with the nature of a remainder. A remainder, as the name imports, is an estate to fall into possession on the natural *determination*, not on the *destruction*, of the preceding estate. A remainder which is limited to commence on the *destruction* of the particular estate is imperfect in its birth; it must either be a vested or a contingent remainder; it cannot be a *vested* remainder if it be to fall into possession on the destruction of the particular estate, the continuance of which is dependant on an event; nor can it be a *contingent* remainder, as it is certain of falling into being either upon the destruction *or* the determination of the preceding estate. The conclusion at common law is, that the *condition* is good but the *remainder* void. The remainder, however, is supported by another name in conveyances to uses and last wills, as will be more fully explained in Chapter XV. on *Conditional Limitations.*

But if the condition for defeating the prior estate be to operate on one event, and the remainder be to arise on another and totally different event, the remainder will not be void; but the particular estate will be discharged of the con-

must have been a tenant to fulfil the feudal duties or returns, and against whom the rights of others might be maintained.

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dition and the remainder held good: in other words, the condition will be void and the particular estate become absolute for the time it is granted. The condition being on one event, and the remainder on another, the grantor has, by the limitation of the remainder, put it out of his power to take advantage of a breach of the condition by entry or claim. To allow him to enter under the condition, would enable him to defeat a good remainder and derogate from his own grant; and it is unreasonable that the grantor should defeat that estate in remainder which he had absolutely given away. Indeed it seems directly within the reason of the common law case put by Littleton before the stat. of Hen. 8., that if a man lease for life, upon condition of re-entry for non-payment of rent, and the lessor afterwards grants away his reversion, the lessor or his heirs cannot enter, because he hath aliened the reversion; *Lit. s.* 347. *Perk. s.* 831: so in the above case, the lessor by limiting the remainder over absolutely, has departed with the reversion as much as if he had afterwards aliened it by another conveyance. In this case, therefore, the condition is void and the remainder good.

By way of exemplification:—If *A.* make a feoffment to *B.*, a widow, for life, provided that if she marry again, then her estate to cease, and immediately after her death *or second marriage* the estate to enure to *B.* in fee, *this* is a bad remainder; because it is limited to take effect, not only on the determination of the widow's estate, but also on the event which is mentioned in the condition to cut that estate short,—namely, her second marriage; but if the remainder had been introduced without the words in italics, then it would have been a good contingent remainder, and the condition would be viewed as surplusage, *Fearne* 270. So if the limitation had been to the widow *durante*

If the tenancy once became vacant, though but for an instant, the lord was warranted in entering on the lands, as the consideration on the part of the tenant had ceased; and, consequently, as no returns were made, there being no one to render the services of the feud, the lord was entitled to resume it. The tenant can only subject his own estate to his own limitations; and, therefore, the moment that estate ended, by the cession of the tenancy, all limitations of that estate were also at an end.

The lord, on the escheat, is in paramount the tenant; he is in of an estate from which the tenant's was originally derived.

Hence then the necessity of an immediate estate of freehold, or of a freehold in possession, being vested in some person actually in existence who may fulfil the duties of the feud, and who may answer to the *præcipe* of strangers; and hence the necessity also of the remainder taking effect during the existence of such particular

viduitate, the remainder would have been good; as then her death or second marriage would have been the natural period for the determination of her estate. But if the remainder had been introduced by the words, "from and immediately after the determination of that estate," it would be liable to objection, on the ground that the remainder-man would be taking advantage of the condition, unless the word "determination" could be construed to refer to the death only of the widow, and not to her second marriage.

estate or *eo instanti* that it determine; as a limitation of an estate cannot take place where that estate itself is no more.

A *vested* remainder may be conveyed to another by fine, by grant, by lease and release, by bargrin and sale enrolled; or the remainder-man may covenant to stand seised. But it cannot be granted to commence *in futuro*; for the law does not permit a person to *reserve* to himself a less estate than he had before.(*a*) And,

Co. *Lit.* 270 a. n. (3). 261 b. n. (1). *Sand. on Uses*, 392, 455.

See *Plowd.* 155 b. 197 b. 8 Co. 74 b.

See *Post.* b. 2. c. 1. of a Feoffment.

(*a*) Every particular estate is considered less than the remainder, and here the remainder-man does in fact reserve to himself a particular estate, as the legal interest in the land remains in him *until* the future period arrives. If the grant be to uses, the whole fee results to the grantor; and consequently, in a conveyance of that character, a remainder may be granted *in futuro* by way of shifting use, as the grantor does not obtain a less, but an equal estate, by the grant. Thus, if a remainder-man convey to *A.* and his heirs, to the use of *B.* in fee after next Christmas, till next Christmas the whole use results to the remainder-man in fee: he does not take a particular estate till Christmas, with remainder to *C.*, but the whole use results to him for an estate in fee, and *C.* takes nothing till Christmas arrives. The remainder-man does not, therefore, reserve to himself a less, but an equivalent estate to the one he had before. If, however, the grant had been directly to *C.* in fee after next Christmas, then, as no estate would pass to him immediately, nor to any other person in the interval, the remainder is not taken out of the grantor; and, consequently, the conveyance operates nothing, and is therefore void, which would be its effect whether the subject of it were in possession or remainder; and therefore it is true, that at common law a remainder cannot be granted to commence *in futuro*, not so much on the

as the freehold is in the particular tenant, a remainder cannot be the subject of a *feoffment*; for a feoffment operates on the possession which the remainder man has not to convey * For the same reason a *recovery* cannot be suffered of a remainder, as the *præcipe* can only be brought against *the tenant of the freehold in possession*. But, if a *præcipe* be brought against the tenant in possession and the remainder-man be vouched and enter into the warranty, he shall then be bound (*a*)

See *Post*. b. 2 Of a Recovery.

1 *Fearne*, 535. *Sand* 335 [Doe *v* Tomkins, 2 *Mau* & *Selw* 165.]

A contingent remainder may be barred *by estoppel* by matter of record, as a fine (*b*) or re-

reason assigned in the text, as upon the invalidity of the grant. An estate in possession cannot be conveyed *in futuro* for another reason relating to abeyance, but that reason does not apply to a remainder.

* Hence remainders are said to lie in *grant*, which was the mode of conveyance, at common law, of those estates which did not lie in livery, or of which livery could not be given.—*Note by Mr. Watkins*.

(*a*) And the remainder-man may levy a fine of his estate in remainder which, however, does not affect the possession. *Roe* v. *Elliott*, 1 *Barn.* & *Ald.* 85.

(*b*) A vested remainder cannot be barred by the direct operation of a fine, but by five years nonclaim on a fine it may. The learned author, however, is not here alluding to fines levied by other persons, but to fines levied by the owner of the remainder. A fine may be levied of a vested remainder, and its effect is, to pass or convey the estate in

covery;(*a*) and if the contingent remainder is such as to be descendible to the heirs of the person to whom limited, if he die before the contingency happen, it may be *devised,* or *passed in equity:* but not otherwise.(*b*)

precisely the same manner as any other assurance; but a fine of a contingent remainder operates to destroy the remainder and accelerate the reversion. *Weale* v. *Lower*, *Poll.* 54. The Courts however seem disposed to question this effect of a fine at the present day. *Davies* v. *Bush*, 1 *M'Lel. & Yo.* 58.

(*a*) But, although a recovery will bar the person suffering it by estoppel, yet the issue in tail (supposing the contingent remainder to be in tail) will not be barred by a recovery suffered by their ancestor, while the remainder is in an executory state. It has indeed been questioned, whether such an act by the contingent remainder-man does not destroy the remainder. This is conceded, if the remainder be in fee, where the heirs claim in the *per*, but being in tail, it is difficult to say, that the issue who claim *per formam doni*, paramount the person suffering the recovery, would be bound by it in the event of that person's death pending the contingency.

(*b*) This passage is rather carelessly expressed, "If he die it may be passed in equity, but not otherwise." The meaning is, that a contract by an adult for sale of his contingent remainder in fee for valuable consideration, will be decreed to be specifically performed in equity, both as against himself and his heir, either in his lifetime or after his death, whether the contingency has happened or not, and whether it be in remainder or possession. Hence, a written agreement for purchase, and proof of payment of the consideration money, seems to be all that is requisite for the conveyance of a contingent remainder while it is executory. The

Contingent remainders may be destroyed, and prevented from taking effect, by destroying the
See *ante*, c. 8 particular estate by which they are supported, (*a*) and, therefore, it is frequently necessary to limit

expense of an actual conveyance need not be incurred till the remainder is vested. As a general rule, it is true, that a contingent remainder may be devised, but if the remainder be contingent on account of the *person*, it cannot be conveyed in any way. Thus, if an estate be limited to the survivor of *A.* and *B.*, neither *A.* nor *B.* can devise or convey his chance of survivorship, for he will not be seised of the same estate at the time of his death, as he was at the time he made his will. 3 *Anstr.* 836. 3 *P. Wms.* 372. But a republication of the will after the survivorship has accrued, would without doubt render the will valid.

(*a*) This destruction may be effected by the merger, surrender, or forfeiture of the particular estate. If the particular tenant attempts to convey a larger estate than he can warrant by an instrument which operates to divest the estates of the remainder-men, as a feoffment, fine, or recovery, he by that act disclaims the tenancy of his estate for life, and usurps the fee; the effect is an immediate and complete forfeiture of his estate for life to the next vested remainder-man. But a lease and release is an innocent assurance, and passes no more than the releasor can convey. Such an assurance therefore by a tenant for life of an estate in fee conveys no more than his particular estate for life, and although that estate is by this means converted into an estate *pur auter vie*, yet the particular estate not being forfeited or destroyed by the release, but only passed, the privity between it and the remainder continues, and consequently the contingent remainder will be well supported by the estate of the releasee.

the legal estate to trustees for the purpose of preserving them. (*a*)

If it be intended in a settlement to prevent the parent, from whom the lands move, from defeating a remainder limited to his heirs general or special,—care must be taken that no particular estate be limited, or be capable of resulting, to such parent; as the estates would, in such case, unite, and the parent have an estate in fee or in tail in himself. (*b*)

1 *Fearne*, 49. 2 *J. Bl. Rep.* 687. Wills & Palmer.

(*a*) The estate of the trustees to preserve contingent remainders should be carefully confined to the life of the particular tenant. The limitation should run thus:—To *A.* for life, with remainder to *B.* and his heirs *during the life of A.*, with remainder to his first and other sons, &c. If the words in italics be omitted, the trustees take the fee; and as a fee cannot be limited on a fee, the succeeding limitations are invalid at law, but in equity they are supported as trusts. If however a term to raise portions or otherwise be afterwards given to the same trustees by the same settlement, or a power to lease during minority be reserved to them, or any other limitation be added clearly incompatible with the existence of the fee in the trustees, they will be held to take an estate for the life of the tenant for life only, although the words may be *large* enough to give them the fee. *Curtis* v. *Price*, 12 *Ves.* 89.

(*b*) When a feoffment is made to *A.* and his heirs, to the use of the heirs of the body of the grantor, the limitation to the heirs of the body takes effect upon the death of the

grantor, not as a springing use, but as a remainder; and the use resulting to the grantor for his life by way of particular estate, the grantor by the union of the particular estate and the remainder, becomes tenant in tail in possession. 1 *Roll. Rep*. 240. 2 *Freem*. 235. This decision is formed on the true construction of the statute of uses, *viz*. that so much of the use as the grantor has not disposed of, and no more, results to him. 1 *Sand. Uses*, 138.

CROSS REMAINDERS.

GIFTS, with cross remainders, are grounded on a tenancy in common. Under a gift to *A. B.* and *C.* as tenants in common in tail, and in default of the issue of either of them then to the other or others of them as tenants in common in tail, and in default of issue of all of them, then to a stranger in fee; *A. B.* and *C.* are tenants in common of one third each in possession, with remainder as to *A*; to *B.* and *C.* as tenants in common in tail, with remainder as to *B.*, to *C.* in tail, and with remainder as to *C.* to *B.* in tail, and so reciprocally as to the other two-thirds. In deeds, cross remainders cannot arise without express words. But in wills, marriage articles and limitations of executory trusts they may be implied. The reason why cross remainders cannot be implied in deeds is, that although in a deed the *remainder* may be implied, yet *words of inheritance* cannot be implied so as to determine what quantity of estate is conferred by the remainder. *Nevell* v. *Nevell*, 1 *Rol. Abr.* 837. *R. pl.* 2. Mr. Sergeant Williams, in a note to *Cook* v. *Gerrard*, 1 *Saund.* 185. (in which many of the cases relating to cross remainders are collected and arranged,) observes, that the reason of the rule may be found in the above extract from *Rol. Abr.* viz. that by way of use an estate tail cannot be raised without the word "heirs." In fact, the words of inheritance are the only part of the intention of the parties which cannot be implied; therefore, if no particular words were necessary to limit the inheritance, cross remainders could be raised by implication in a deed as well as in a will. See also *Cole* v. *Levington*, 1 *Vent.* 224. *Doe* v. *Worsley*, 1 *East* 430. *Doe* v. *Wainwright*, 5 *T. R.* 428.

Wills are construed upon the intention. If lands are devised to two persons, provided that if they die without issue, then over: if one of them dies without issue and the other dies leaving issue, a question arises whether the moiety of the

former is to go over to the remainder-man when the words of gift are, that the estate shall not to go over to him till the death of *both* the devisees without issue. To prevent an abeyance the law implies cross remainders between the devisees; on which construction, the one who has issue will take the whole on the death of the other without issue, and this to meet the manifest intention of testators. But the estate implied must always be an estate tail, and therefore if the words will not admit of the implication of that estate, cross remainders cannot arise.

The old rule was, that cross remainders could not be implied between more than two devisees, but it is now fully settled that cross remainders may be implied between any number of devisees if the circumstances will warrant the implication. The rule is thus laid down by Lord Mansfield: "Between *two*, the presumption is in *favour* of cross remainders, between *more than two*, the presumption is *against* them; but in either case the intention of the testator may controul the presumption." *Doe* v. *Burville*, *Lofft* 101. 2 *East* 47. *Wright* v. *Holford*, *Cowp.* 31. *Phipard* v. *Mansfield*, *ibid.* 797. *Atherton* v. *Pye*, 4 *T. R.* 710. *Watson* v. *Foxon*, 2 *East* 36. *Roe* v. *Clayton*, 6 *East* 634. *Doe* v. *Webb*, 1 *Taunt.* 234. *Green* v. *Stephens*, 12 *Ves.* 419. and *S. C.* 17 *Ves.* 64. *Mogg* v. *Mogg*, 1 *Meriv.* 655. *Horne* v. *Barton*, 19 *Ves.* 398.

It is merely necessary to add, that a tenant in tail, with cross remainders over, may by common recovery convey his own purparty of the estate in fee. But he cannot alone, by recovery or any other means, convey his remainders in the shares of his companions, for having no estate of freehold in possession in those shares he cannot make a tenant to the præcipe. However by levying a fine with proclamations he may convey all his estates in remainder, for his issue could never claim in opposition to his fine; and if he covenanted to suffer a recovery of those remainders when they came into his possession, a purchaser from him would have as effectual an assurance as the nature of the case would admit.

CHAP. XIV.

OF AN EXECUTORY DEVISE.

AN executory devise differs from a remainder (among other things) in this, that a remainder *must have a particular estate to support it,* while it is essential to an executory devise that *no particular estate be in existence;* it being a rule, that that shall never be construed an executory devise which can be supported as a remainder. (*a*) 2 *Bl. Comm.* 179. 2 *Fearne.* 2 *Saund. Rep.* 388, Purefoy *v.* Rogers.

(*a*) The five distinctions deducible from Mr. Fearne's book on this subject are the following.

An executory devise differs from a contingent remainder:

1st. Because an executory devise is admitted only in last wills and testaments.

2dly, Because an executory devise respects personal estate as well as real.

3dly, Because an executory devise requires no preceding estate to support it.

4thly, Because when any estate precedes an executory devise, it is not necessary that the executory devise should vest when such preceding estate determines. And

5thly, Because an executory devise cannot be prevented, or destroyed, by any alteration whatsoever in the estate out of which or after which it is limited.

Thus if a testator devise to *A.* and his heirs, but if *A.* should die without issue in the lifetime of *B.*, then to *B.* and his heirs; in this case, *A.* cannot bar the limitation over to *B.*—The

See as to the accumulation of profits, *Stat.* 40 *Geo.* 3. *c.* 98.

By executory devise a fee or less estate may be limited after a fee, either absolute or base; so it be to take effect in possession within a life or lives in being, or within twenty-one years afterwards. (*a*)

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fifth position, however, requires this qualification, that if the executory devise be limited to take effect on an estate tail, then the tenant in tail may by recovery bar the entail and all remainders, executory devises, and conditional limitations dependant thereupon. If the executory devise is expectant on an estate in fee, then as the position intimates there are no means of preventing its taking effect if the event happens on which it is to arise. But though executory devises are admitted in last wills and testaments only, yet in deeds taking effect by the statute of uses, limitations tantamount to executory devises are allowed under the denominations of conditional limitations and contingent or shifting uses.

(*a*) The rule against perpetuities does not apply to remainders: 1st, because every remainder which is contingent must vest in interest during the continuance of the particular estate or the very instant it determines; and, 2d, because the owner of every vested remainder has the power, when in possession, of barring all subsequent remainders by common recovery. Hence a limitation to *A.* for life, with remainder to the first son of *B.* in tail, does not create a perpetuity; because, although it may be more than twenty-one years after the death of *A.* that *B.* has a son, yet, on *A.*'s death, it is ascertained whether the estate is to go according to the limitation, or whether it shall revert to the settlor or his heir. So in the instance of a limitation to *A.* for life, with remainder to the first son of *B.* and the heirs of his body, and after failure of such issue to *C.* for life, with remainder to his first son and the heirs of his body, with like remainders over,—this does not create a perpetuity in the eye of the law, although it may prove in event that there is not a

failure of the issue of the first tenant in tail till one hundred years after the date of the conveyance; for as each successive tenant in tail, when of age, has the power of suffering a recovery to bar the entail and remainders over, the estate cannot be *certainly* inalienable for a longer period than twenty-one years after the death of a life in being. It may happen that *B.*'s eldest son shall marry and die before twenty-one, leaving issue, by which means the estate would be tied up for another minority (except released by act of Parliament); yet, as this event is not certain, and is an act of providence rather than of the party, the rule is not transgressed by this limitation in its inception. Hence it is apparent, that the fee cannot, by way of remainder, be without an owner for a longer period than a life in being.

By executory devise the rule is clearly established as above stated. It arose from the usual practice of settling real estates to the husband for life, with remainder to his sons in tail; which being allowed, renders the estate inalienable during the existence of a life in being, and twenty-one years after; that is, till the son of the tenant for life attains his full age. From one life the Courts gradually proceeded to several lives in being at the same time; for this in fact only amounted to the life of the survivor: and as it might happen, that a tenant for life, to whose unborn son an estate tail was limited, might die, leaving his wife *ensiente*, an allowance was also made for the time of gestation of a posthumous son; and, therefore, it is commonly laid down as a general rule, that an estate may be rendered inalienable during the existence of a life, or of any number of lives in being, and nine months and twenty-one years after. Some writers add another period of nine months at the end of the twenty-one years, as an infant tenant in tail might marry and die, leaving his wife pregnant; but the minority of the second posthumous son may, with as much propriety be added, as this second period of gestation; and as the same casualty may happen to the grandson, the estate may in event become inalienable for an indefinite period of time. It is obviously incorrect even to say, that an es-

tate may be tied up for a life or lives in being, and *nine months* and twenty-one years after by *original limitation*, for the nine months are dependant on a very uncommon *event;* and it is apprehended, that the twenty-one years cannot by original limitation be made a separate independant term, during which the estate shall be inalienable. The period after the life in being must, it is submitted, be measured by the minority of the next taker. See on the subject of perpetuities, and restraints on alienation, 2 *Ves. & Bea.* 61. 5 *Taunt.* 393. *S. C.* 5 *Barn. & Ald.* 801. 4 *Ves.* 337.

It was once doubted, whether an estate for life could be limited to a person *unborn;* but it is now settled, that such a limitation is valid. In *Hay* v. *Coventry*, a testator devised an estate to an unmarried man for life, with remainder to his first and other sons in tail, with remainder to all and every his daughters, equally to be divided between them; but forgot to add words of inheritance to the limitation to the daughters. An only daughter of *A.*, born after the testator's death, was held to take an estate for life. 3 *T. R.* 83. But an estate cannot be limited to the *issue of a person unborn* to take by *purchase:* such a gift involves three lives (the father, son, and grandson), while only one life (the father) is in being, and though there is a possibility that the rule against perpetuities may not be contravened by this limitation, as it may happen that the tenant for life shall have both a son and a grandson born in his lifetime or within twenty-one years after his death; yet, as the devise tends so strongly to a *remotissima propinqua*, the Courts have held it void on the tendency which it has to a perpetuity; but where there is nothing on the face of the will to interfere with such a construction, the Courts have, under the doctrine of *Cyprès*, given the son (when born) an estate tail—*that*, in general, being found the best to coincide with the intention of the testator. Thus in *Humberstone* v. *Humberstone*, 1 *P. Wms.* 332, a testator gave his estate to the Drapers' Company and their successors, in trust to convey the said estates to her godson, *A.*, for life, and afterwards to *his* first son for life, and so to the first son

of that first son for life, and *in failure of such issue*, over. Lord Chancellor Cowper held, that although these limitations tended to a perpetuity, and were therefore void; yet, that the intent of the party might prevail as far as the rules of law would allow, he decreed that all the devisees in being should take estates for life; but that the limitation to the sons unborn should be in tail.—The words in italics in the above devise contributed no doubt in a great measure, to produce this decree. In a late case, a testator devised real estate to two trustees, until some son of Major Le Hunt should attain twenty-one; and then the testator gave the same real estate to such son for life, with remainder to his first and other sons in strict settlement, and so on to every son of the said Major Le Hunt, with remainder to the right heirs of *A. B.* The Court of King's Bench certified, that the eldest son of Major Le Hunt, having attained twenty-one years, took an estate tail in the subject of devise. *Le Hunt* v. *Hobson*, *K. B. Easter Term*, 1826. If a devise be void for a perpetuity, all the devises over are likewise void. The Court of Common Pleas, however, held otherwise in *Beard* v. *Westcott*, 5 *Taunt.* 393; but that adjudication has lately been overruled by the Court of King's Bench, 5 *Barn. & Ald.* 801. *et vide* 2 *Ves. & Bea.* 54. Thus much for the limitation of the *corpus* of an estate in perpetuity.

As to trusts for the accumulation of the rents and profits, it is enacted by Thellusson's act (39 & 40 *Geo.* 3. *c.* 98.), that no person, after the passing of that act (28 *July*, 1800), shall by any deed or will, settle or dispose of any real or personal property so and in such manner that the rents, issues, profits, or produce thereof, shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or settlor, or the term of twenty-one years from the death of any such grantor, settlor, devisor, or testator; or during the minority of any person living, or *en ventre sa mère*, at the time of the death of such grantor, devisor, or testator; or during the minority of any person who, under the uses or trusts of the deed or will, would, if of full age, be entitled to

the rents or annual produce so directed to be accumulated: and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents and produce shall, so long as the same shall be directed to be accumulated contrary to the provisions of this act, go to such person or persons as would have been entitled thereto, if such accumulation had not been directed. Sect. 1.

Upon this statute it has been decided that a disposition for an accumulation for a longer period than the act allows, is valid for the time allowed, and only void for the excess. *Griffiths* v. *Vere*, 9 *Ves.* 127. *Longdon* v. *Simson*, 12 *Ves.* 295. But such excess must be clearly distinguishable from the valid part of the disposition, though it need not *follow*, but may, if clearly distinguishable, precede the sound part of the trust. Where a person devised to trustees, in trust to pay the rents to *A.* for ninety-nine years if he should so long live, and after his death to his first son, and then to the eldest son of such first son in like manner: but if *A.* should die without issue, or should have issue, and such issue should die under the age of majority, then to *B.* absolutely: the Court of Common Pleas held, that the executory devise over to *B.* was good. 5 *Taunt.* 407. But the case being again lately argued in the Court of King's Bench, the Judges there held that the devise to *B.* was absolutely void. 5 *Barn. & Ald.* 801. In *Thelluson* v. *Woodford*. Lord Alvanley said, "As to the period of twenty-one years, it has never been considered as a term that may at all events be added to an executory devise or trust. I have only found this *dictum*, that estates may be inalienable for lives in being, and twenty-one years, merely because a life may be an infant or *en ventre sa mere*." In *Beard* v. *Westcott*, 5 *Barn. & Ald.* 805. Mr. Sugden supported this position by much sound learning; but the Judges delivered no opinion on the point. In the Court of Common Pleas, however, on a former stage of the same case, this question was separately argued; and the Judges there decided, that the term of

Or a fee may be limited to commence *in futuro*; as, till such fee take effect, the inheritance shall descend to the right heirs of the testator.(*a*)

Remainders (or at least what we may here call remainders) of chattels, either real or personal, may be limited by executory devise, so Harg. n. (5.) to *Co. Litt.* 20 a. 2 *Fearne*, *passim*.

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twenty-one years might be a term in gross, without reference to infancy, which is the standing adjudication on the subject;* but whether that adjudication will be followed (overruled as it is in a principal point) may admit of doubt.

(*a*) And although the executory devise is dependent on the arrival of a future period only, and not on a contingent event, so that the executory devise is sure to take effect on the day appointed, yet the heir will take the whole fee in the interim, and not merely a term bounded by the ascertained continuance of his estate. Thus if *A.* devise land to *C.* and his heirs from the 1st day of January next after the testator's decease, the fee will descend to the heir at law of *A.* till the 1st day of January, when the executory devise will operate, and carry the fee simple to *C.* in possession. Till the arrival of the day *C.* has not any estate or interest in the land. In the language of Mr. Butler, "he has not an estate in *possession*, as he has not a right of present enjoyment, he has not an interest in *remainder* as the limitation to him depends on the estate in fee simple which descends to *A.*'s heir; he has not a *contingent interest*, as he is a person in being and ascertained, and the event on which the limitation to him depends is certain; and he has not a *vested estate*, as the whole fee is vested in *A.* or his heirs. He has, therefore, no estate; the limitation being executory, and confering on him and his heirs a certain fixed right to an estate in possession at a future period." *Butl Fearne* 1.

they be limited to a person or persons in being, or to vest within twenty-one years after the death of a person or persons in being; but if the remainder be such as, if it were of freehold
See ante. c. 2.
property, would amount to an express entail, it shall rest in the person in whom it so vests, and be at such person's disposal, or go to his representative on his death.(*a*)

2 *Fearne*, 51, &c.

An executory devise cannot be barred or de-

(*a*) This passage requires some qualification. If freehold property be devised to "*A.* and his heirs; but if he shall die without leaving issue, then to *B.* and his heirs," the words "without *leaving* issue" have been held to mean an indefinite failure of issue, and of a consequence to create an estate tail in *A.*, with remainder to *B.* in fee. But the same words as to leaseholds have been construed to mean a failure of issue *living at the death of the legatee*; and, therefore, a bequest of leasehold property held for a long term of years, to "*A.* for ever; but if he shall die without leaving issue, then to *B.*," gives *A.* the entire interest in the term, subject to an executory devise over in favour of *B.*, dependent on the event of *A.*'s dying without issue living at the time of his death. The general rule is, that in devises of terms for years or other personal estate, the Courts are much inclined to lay hold of any words in the will, to confine the generality of the expression *dying without issue*, to dying without issue *living* at the time of the legatee's decease. But with respect to freeholds the rule is just the reverse. *Shapland* v. *Smith*, 1 *Bro. Ch. Ca.* 75. *Hodgson* v. *Bussey*, 2 *Atk.* 89. *Wilkinson* v. *South*, 7 *T. R.* 555. *Briton* v. *Twining*, 3 *Meriv.* 183. *Kinch* v. *Ward*, 2 *Sim. & Stu.* 409. *Fearne, C. R.* 471, *et seq.*

stroyed by any act *of the person taking the preceding fee,* though by feoffment or matter of record.(*a*)

But *the person entitled to the executory estate may bar his own claim by release to the first taker in possession; or assign it in equity for a valuable consideration;* or *devise it by his last will.* 2 Fearne, 58, &c.

So if *the person entitled to the executory estate comes in as a vouchee on a common recovery,* or *levy a fine,* he shall be barred by estoppel.(*b*)

(*a*) If the preceding fee be an estate tail, the tenant in tail may suffer a recovery, the effect of which would be, to destroy the executory devise and all remainders over. *Pig. Rec.* 130. 131. *Cov. Rec.* 176. The consequence is, that an executory devise limited to take effect on an indefinite failure of issue is not too remote, because it is all times capable of being barred by recovery.

(*b*) On a devise to "*A.* and his heirs, and if he die without issue in the lifetime of *C.*, then to *C.* and his heirs," if *A.* enter and suffer a common recovery without vouching *C.* the executory devise to *C.* is not barred by the recovery. *Cro. Jac.* 592. It will be observed, that this is an executory devise expectant on an estate in fee, and could not, therefore, be barred by the recovery of *A.* alone, as it might have been if the limitation to *A.* had been to his issue instead of to his heirs.

CHAPTER XV.

OF A CONDITIONAL LIMITATION.

1 Fearne, 9, 414 Sand. Uses, 182, &c.

A *REMAINDER* is to *commence* when *the particular estate* is, from its very nature, to *determine*; it is, as it were, a continuance of the *same estate; it is a part of the same whole. A conditional limitation is not a continuance of the estate first limited,* but is entirely a *different* and *separate* estate. It is *not* to commence *on the determination of the first, but the first is to determine when the latter commences.* It is the *commencement of the latter* which rescinds and destroys the former; and not the *ceasing of the former* which gives existence to the last. The particular estate and remainders are, in fact, as the very terms imply, *but one and the same estate.* The estate first appointed, and the conditional limitations, are *separate* and *distinct estates* (*a*)

(*a*) Between a condition and a conditional limitation there is this difference:—a condition respects the destruction and determination of an estate—a conditional limitation relates

If *an estate tail* be first limited, and a conditional limitation be made upon that es- See *Cowp.* 379, Driver *v.* Edgar.

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to the commencement of a new one. A condition brings the estate back to the grantor or his heirs—a conditional limitation carries it over to a stranger. Breach of a condition gives a *right*—the happening of the event whereon the conditional limitation depends gives an *estate:* some act must be done by the grantor or his heir to reduce the estate into possession on breach of a condition, he must enter or claim: it is the office of a conditional limitation to destroy the prior estate and create a new one without any act to be done by the successor. The property of a condition is to determine the whole estate, and we have seen, *ante*, p. 164. that a remainder cannot, in consequence, be limited to commence on an event which is marked out by a condition to defeat the preceding estate. This, however, being a strict rule of law, is confined to limitations taking effect by the common law. In the construction of conveyances to uses and wills, a distinction is allowed between words, which operate by strict condition, and those which do in fact but limit or circumscribe the boundary of the estate, though they sound conditionally. Thus, words, which in conveyances at common law would be held to create strict conditions, have, in conveyances to uses and wills, been construed to confer *estates*, which are appropriately called conditional limitations. If a conveyance be made to *A.* and the heirs of her body, provided she marries with the consent of certain trustees, but in case she marry without such consent, or die without issue, then to *B.* in fee; *B.*'s remainder would, under this conveyance at common law, be void. If such a limitation were contained in a conveyance to uses, or in a will, the estate of *B.*, though insupportable as a remainder, would yet be good as a conditional limitation, to effectuate the obvious intention. *Fry's case*, 1 *Vent.* 199. *Gulliver* v. *Ashby*, 4 *Burr.* 1930. But, though these pe-

tate,(*a*) *a recovery* suffered by the tenant in tail, before the event or condition happen on

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culiar gifts are termed conditional limitations, they are, in fact, nothing more than executory devises, and shifting, springing, or contingent uses. The conditional limitation is the common quality of all; the devise and the use are merely indicative of the conveyance. An executory devise is a conditional limitation by *will*,—a shifting use is the same by *deed*, —the latter more perfectly because a preceding estate is usually created with it, and the time previous to the happening of a conditional limitation should, and usually is, filled up with a limitation which the subsequent conditional gift cuts short,—if there be no preceding estate the future isolated gift assumes the character of an executory devise or contingent use,—if there be a preceding estate then the subsequent interest is in strictness a conditional limitation. This distinction however, is not always attended to in practice.

If an estate be devised to *A.* for life, and if he shall have issue male living at his decease then to that issue male as tenants in common in fee, but if he shall die without leaving any issue male living at his death, then to *B.* in fee, the learned are not agreed what particular class of limitation this species of gift should be referred to; some say the two fees are concurrent, but they are clearly not co-existent; some call them alternate fees, but that is not a characteristic; they are clearly not remainders, because if *A.*'s estate were determined, they would still come into existence on his death, and they can scarcely be called conditional limitations, as their existence depends more on a contingency than on a condition; they are, in fact, parts of a perfect executory devise, which provides for the non-happening as well as for the happening of the given event.

(*a*) For an instance of which, see the case mentioned in the last note.

which the limitation is to arise, will bar the estate depending on that event or condition.

As to the barring such conditional limitation by *estoppel,* and assigning it in equity, or devising it, the law seems to be the same as with respect to an executory fee by devise.

CHAPTER XVI.

OF A REVERSION.

2 *Bl. Comm.* 175. *Co. Litt.* 22 b. *Plowd.* 151. Throckmorton *v.* Tracy.

WHEN a person has an interest in lands, and grants a *portion of that interest*, or, in other terms, *a less estate than he has in himself*, the possession of those lands shall, on the determination of the granted interest or estate, *return* or *revert to the grantor*.

It must here be remarked, that it is said the *possession* of the lands shall return to the grantor on the determination of the grant, for a *present interest* remains even during the existence of the grant in the person making it; and this interest is what is called *his reversion*, or, more properly, *his right of reverter*.(*a*)

(*a*) A reversion seems to be something more than a bare right; it is an actual estate in the land, bearing the fruits of seignory. When a conveyance is made to two persons for life, with remainder to the *survivor*, this is a contingent remainder, and the particular estate may be determined before the contingency happens; in which case, the fee would revert back to the settlor. This possibility of interest in the settlor

This right of reverter can only arise by the *act of law; it cannot be created by the act of the party,* though it is a consequeuce of his previous act. If a person limit particular estates to strangers with the ultimate limitation to himself in fee, or to his own right heirs, the latter limitation shall not take effect *as a remainder*, or by reason of the *express limitation* of the grantor; but, as the law would have given to him or his heirs, as a consequence of the preceding limitation, the same interest or estate as the express words would have conveyed, those words shall be deemed wholly nugatory, and the grantor or his heirs shall be in *in reversion*, or of *the old estate*. *Watk. on Desc.* 168.

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is slightly distinguishable from an actual reversion, and may, with propriety, be called a right of *reverter*: during the pendency of the contingent event, the fee, it is apprehended, is in abeyance, and not in the reversioner, the tenant for life rendering the rights of seignory to the lord. If the reversion be an actual estate, the tenant for life holds of the reversioner, and the reversioner holds of the lord; but if the ultimate reversion be in abeyance, and the grantor has but a bare right of *reverter*, then the tenant for life, it is conceived, must be considered as holding of the lord. By the statute of *quia emptores*, if the grantor parts with the whole estate the grantee holds of the lord; if he creates an estate for life with remainders, allowing an actual reversion to devolve on himself, the particular tenant and remainder-men hold of the grantor, and not of the lord; but if the grantor have only the possibility of reverter, then, as he has no actual estate, the case must be considered as within the statute, and the consequence will be, that the tenant for life holds of the lord and not of the grantor.

Watk. on Desc. 110, 111.

A reversion, being *an immediate interest*, may be conveyed to another person, though to an utter stranger. The conveyance of it need not be confined, like the conveyance of a right, to the actual tenant of the freehold. The proper mode of conveying a reversion is by *grant;**

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* Mr. *Fearne* is represented as having been of opinion (*Posthum. Works*, 28.) that the *grant* of a reversion, in consideration of *money*, *would require enrolment under the statute of Henry* VIII. But he was evidently mistaken if he entertained such opinion, as the statute of 27 *Hen.* VIII. c. 16. is expressly confined to conveyances by bargain and sale *only*, and does not embrace grants, which have nothing to do with a bargain and sale. Besides, that statute has an immediate and manifest relation to *the statute of uses;* and was ordained in order to prevent *secret transfers*, which might have been effected by a bargain and sale, as the bargainor would stand seised to an use, and that use would have been immediately executed by the statute, as, at this time, is the case of a bargain and sale of a chattel interest, or lease for a year. The *bargain and sale* were, therefore, ordered to be enrolled; but *a grant* of a reversion was *not*, at the time of that statute, a *secret conveyance*, as it was not good without *attornment*, which was a matter of publicity, and answered the same purposes as livery did on a feoffment.

Of *attornment*. See *Gilb. Ten.* 81. & *post.* b. 2. c. 2.

2 Vent. 149, &c.

And the only case which Mr. *Fearne* has referred to* is that of *Lade* v. *Baker*, which cannot apply to the subject at this day, since the statute of *Anne* has rendered attornment unnecessary.

In the case of *Lade* v. *Baker*, the conveyance then in question was declared to be *not* good *as a bargain and sale*, for want of enrolment;—that it could not be taken as *a covenant to stand seised*, because it was not pleaded as such, but as a grant; and that it was not good *as a grant*, because

though it may also be passed by *a lease and release*,(*a*) or *bargain and sale*, such bargain and sale being regularly enrolled; or the reversioner may *covenant to stand seised*; but a reversion cannot be granted to commence *in futuro*.(*b*)

See n. (1.) to *Co. Litt.* 270 a. & n. (1.) to 271 b. s. iii. *Sand. Uses*, 450—5. 469. 2 *Co.* 15. Wiseman's case. *Watk. on Desc.* 111. n. (t.) 139. N. a. 2d ed.

But, even anterially to the statute of frauds (29 *Car.* II.), a reversion could not be conveyed *by parol*; it must have been *by deed*, as it lay not in livery. For where *the possession did not pass*, the law required *a deed*, or a solemn instrument under seal, when there was no matter of record, as the evidence of the transfer.

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it was pleaded *without attornment*. The case of *Lade* v. *Baker*, therefore, seems to negative the doctrine of Mr. *Fearne*, as it implies that the conveyance spoken of would have been good WITHOUT ENROLMENT, *if attornment had been pleaded and proved*; and, as attornment is now become unnecessary, it seems to follow, that *such* a *grant* would now be good.—*Note by Mr. Watkins*.

(*a*) Which is now the usual mode of passing the reversion, as it saves the expence in future investigations of the title of proving the existence of a particular estate at the time the reversion was conveyed as such.

(*b*) Attornment was formerly necessary to perfect the transfer of a reversion, and attornment was originally *coram paribus* and equivalent to livery of seisin. It followed, that a reversion could not be granted *in futuro*, a rule which still governs the transfer of reversions.

A reversion may also be *charged* by the person entitled to it.(*a*)

See *ante*, c. 8. & *post*. b. 2. c. 16. See as to the operation of a fine, *ante*, c. 8. & *post*. c. 15. Of Fines.

If an estate tail be created, the reversion, unless it be in the crown, may be barred or destroyed by the tenant in tail suffering *a recovery* of the premises by virtue of the statutes of *Hen*. VII. & VIII.(*b*)

(*a*) And as it is assignable, so it is devisable. 5 *T. R.* 93

(*b*) If the reversion be in the Crown by its own reservation, there can be no doubt of the imbecility of the recovery; but if the reversion descend or become forfeited to the Crown, there is said to be a doubt whether it is then protected by the statute of *Hen*. 8. The act recites, that divers of the King's most noble progenitors, and especially King Henry VIII, most liberally above all other had given and granted, or otherwise provided, to his and their loving and good servants and subjects, lands, tenements, rents, services, and hereditaments, to the intent to recompence them for services performed. It is, therefore, enacted, that no recovery by a tenant in tail of any lands, tenements, or hereditaments, "whereof the reversion or remainder at the time of such recovery shall be in the King, shall bind or conclude the heirs in tail;" but, that after the death of any such tenant in tail, against whom any such recovery shall be had, the heirs in tail may enter, have, and enjoy the said lands and tenements, the said recovery to the contrary notwithstanding. 34 & 35 *Hen*. 8. c. 20. In a late case, a settlement was made to the use of the first and other sons of *A. B.*, severally and successively, in tail male, with divers remainders over, with ultimate remainder to the right heirs of the settlor. The settlor was afterwards attainted of treason, whereby his reversion in fee became forfeited to the Crown. A tenant in tail male

The reversioner continues tenant to the lord during the existence of the particular estate;

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under this settlement, when in possession, suffered a recovery, and sold the premises to Lord Clanmorris, who now objected to the title, on the ground of the doubt said to be afforded by the books as to the operation of the recovery in barring the reversion forfeited to the Crown. In the House of Lords the existence of the doubt was recognized; but their lordships made no attempt to settle the question. General opinion said Lord Redesdale was certainly against the title, but it was not necessary to come to any decision on the point. It was sufficient, on the question before the House, if the law was doubtful. A purchaser had a right to require a marketable title, and this title rested on a point of law which was at least doubtful. The Lord Chancellor also thought that the doctrine on this point could not be stated so clearly against the Crown, that a purchaser ought to be compelled to take a title depending on it; and, that as the purchaser had been brought into Court upon a doubtful title, he ought to be discharged from his purchase, with costs, which was accordingly done. *Blosse* v. *Clanmorris*, 3 *Bligh*, 62., *et vide* further on this subject, *infra ch. Fines and Recoveries*, and *Cov. Rec.* 222.

In carrying this case to the House of Lords, it might reasonably have been conjectured, that their lordships would not have dismissed the law in the same uncertain state as they found it—that they would have gone into the merits of the question, and have decided on the value of the title accordingly. It was natural to expect, that so high and potent a tribunal would not have recognized what in reality cannot exist,—a doubt in the law; particularly, as there is no superior Court to which resort may be had for solution of the problem. It may be justly questioned, whether an inferior tribunal has power to decide a point which the House of Lords has pronounced to be doubtful. The rule respecting doubtful titles being generally disapproved, it was fair to reckon on its re-

and the particular grantee shall hold of the reversioner; and, as a necessary consequence or incident, the rent, fealty, &c. shall always follow the reversion. (*a*)

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jection in the dernier resort, and the parties scarcely expected at the expence of an appeal to be involved in the same uncertainty as that which surrounded them when they approached their Lordships. They are, however, in a worse situation than they were before; they have now a title branded unmarketable by the highest tribunal in the kingdom, on a point too which their Lordships only could settle. The intention of Courts is, to decide doubts, not to foster them. A foreigner would fancy that the doubt was part of the law of the land, when informed that the highest Court in the realm had, on solemn argument, declared its existence. In this case, the misconception of an old text writer seems to have created the division of opinion, and that *ignis fatuus* has served to light a noble lord through all the intricate mazes of a protracted chancery suit. It is curious to see a Judge listening with great earnestness to an argument, framed for the express purpose of mystifying the law; and, ultimately, so far departing from the manifest object of his office, as to approve of the argument, by adjudging that the *doubt* is *clearly* established. The knot, if it cannot be untied, should be cut, and some *certain* decision given for the prevention of litigation in future.

(*a*) Consequently, if a *remainder-man* grants an estate commensurate with the prior interest in the land, nothing passes; but if a *reversioner* makes such a grant, the fruits of seignory will pass, and the conveyance will be good. Thus if *A.* grant to *B.* for life, with *remainder* to *C.* in fee, and *C.* grant to *D.* for the life of *B.*, this grant is nugatory: but if a tenant in fee grants to *A.* for life, and afterwards grants to *B.* for the life of *A.*, this latter grant will be valid, and confer on

As the creation of a particular estate is of absolute necessity to give existence to a reversion, so the continuance of the reversion depends upon the continuance of the particular estate; for if, by any means, as by forfeiture, surrender, or regular expiration, such particular estate determine, the interest of the grantor must cease, of necessity, to be an estate *in reversion*, and will become an estate *in possession*, into which he may immediately enter. *Plowd.* 153. 155.

B. a remainder, which will fall into possession on the forfeiture or merger of the prior estate in *A.* *Co. Litt.* 49. *Salk.* 232. *Ld Raym.* 523.

CHAP. XVII.

OF A RIGHT.

Gilb. Ten. 21, &c. 37, &c. 2 Bl. Com. 195. ONE person may have *the actual possession* of certain lands, and another the *right of possession*, or the *right of propriety*; as, if a person enter wrongfully into my lands, he will have the *actual* possession; but I may enter and oust him if I please, as *the right of possession* is in me.(*a*)

(*a*) This power of actual entry is now very much curtailed. It was formerly allowed even to actual ouster; but at the present day appeals to force are much discouraged. A right of entry, according to modern notions, may be defined to be, a right to bring an action of ejectment. When real actions fell into disuse, the phrase, "right of entry," became inapplicable to the remedies retained. It is only as opposed to a right to sue in *a real action* that it can be properly understood. Real actions are not abolished, but they are grown obsolete. There was a certain length of time, during which the right might be pursued without resorting to the formidable process of a real action; during that time the party might have made an actual entry: but such entries obviously tended to and frequently produced breaches of the peace. To prevent this, a new species of action, called an ejectment, was introduced: by means of which, all claims of title to *enter* were tried and adjusted; and to facilitate the use of

If, however, I do not exert that right and enter within a limited time, my power of entering is taken away, and I am driven *to my action*, to recover the possession; and if I do not avail myself of my possessory action, I shall have only *a right of propriety*, or *mere right*, left.

A *right* is *not grantable over*; it can only be *extinguished*. It cannot be even *surrendered*, nor will it *pass* to a *stranger* by *fine*, though by such fine the right would be *barred*, as the cog- 10 Co. 46 b. Lampett's case. n. (1.) to Co. Litt. 265 a Co. Litt. 38 a. Touchst 14 2 Co. 55, 56. Buckler's case.

this action, the law on forcible entries, as laid down in *Co. Litt.* 257 b., was more strictly administered. By that law it appears, that a peaceable entry by the rightful owner will subject him to the penalties of a forcible entry if he *detains* possession after it has been demanded by the person ousted; a peaceable entry therefore cannot avail much. But though the phrase, "right of entry," is thus inaptly retained, its use is to ascertain the right to bring an action of ejectment, which cannot be maintained by a person who has not a right of entry. *See* 2 *Wood. Lect.* 170. In the case of vacant and open possession, the peaceable entry of the rightful owner is perhaps an exception to the above remarks; but the appearance of the late tenant, and a demand of possession by him, would without doubt be sufficient to constitute a forcible *detainer*, if the possession were not immediately restored to him. See also on this subject, the late case of *Milner* v. *M'Lean*, 2 *Car. & Payne* 17. As to descents which toll the entry, objections on that head are now overcome, by laying the demise in the lifetime of the ancestor, which, by the common consent rule, the defendant is obliged to admit before he will be permitted to defend the action, and if he does not defend, judgment will be given against him by default. *Adam. Eject.* 41.

nizor cannot claim a right against his own fine, which is a matter of record, and, by consequence, an estoppel; as by that fine he *has acknowledged*
Plowd. 485. *the right to be in another* It is not *devisable*.(*a*) The proper mode of extinguishment is that of *a release*, or fine *sur cognizance de droit tantum*, to the person in actual possession of the lands.(*b*)

(*a*) But only descendible. 1 *Stra.* 132. 2 *Atk.* 420.

(*b*) A release of right to the remainder-man will enure to the benefit of the particular tenant. *Co. Litt.* 353.

CHAP. XVIII.

OF A POSSIBILITY.

A POSSIBILITY cannot be on a possibility. A possibility may be *released*; is *devisable*; is *assignable by commissioners of bankrupt*. It may be barred *by fine*, by way of estoppel; but it should seem not otherwise. So it is *assignable in equity*, at least if accompanied with an interest; so an agreement to settle lands in possibility shall be decreed, if they afterwards descend. (*a*)

10 *Co.* 50 b. 1 *Strange.* 132. 2 *Atk.* 420. 1 *Hen. Blackst.* 30. 3 *Durnf. & East*, 88. 2 *Pr. Wms.* 132. 2 *Atk.* 420. 10 *Co.* 50 a. See 1 *Ves.* 390. 2 *Fearne.* 522. 2 *Black. Comm.* 290. 1 *Ch. Rep.* 158.

(*a*) Possibilities are generally arranged into two classes: the one consisting of possibilities which are coupled with an interest, such as contingent remainders, executory devises, springing or shifting uses; the other bare or naked possibilities, such as the hope of inheritance entertained by the heir on the courtesy of his ancestor, or the chance of succession of an individual where the gift is to several with remainder to the survivor. The former class may, perhaps, with more propriety be denominated contingent interests, and the latter mere expectancies; for a possibility coupled with an interest is more than a possibility, it is a present interest, and may be devised. *Perry* v. *Phillips*, 17 *Ves.* 173. 182. On the other hand, the expectancy of an heir-apparent, dur-

ing the lifetime of his ancestor, is less than a possibility, being but a mere hope or anticipation. All contingent interests are executory, and while they remain so, the owners cannot assign them at law. 10 *Co.* 50 a. 4 *Co.* 66 b. 1 *Inst.* 264 b. 265 a. b. *n.* 212. 1 *Ves.* 390. 409. 3 *Ves.* 391. 3 *T. R.* 88. 7 *T. R.* 589. But contingent interests, and even mere expectancies, may be bound at law by estoppel. Thus, where a husband and wife granted to trustees an estate, of which the wife's father was seised in fee simple, and afterwards in the lifetime of the father they levied a fine of the lands to the uses of the settlement, and the father died, leaving the wife one of his coheiresses at law: on a question concerning the effect of these assurances, it was held by the Court of King's Bench, that the moiety of the wife became subject to the uses of the settlement by reason of the fine, which operated as an estoppel against the husband and wife and all persons claiming title under them. *Helps* v. *Hereford*, 2 *Barn. & Ald.* 242. In equity every species of contingency may be bound by contract for valuable consideration. 1 *Ves.* 409. 2 *P. Wms.* 132. 191. 2 *Atk.* 420. *Sed vide* an exception, 3 *Meriv.* 667. But although the contract of an expectant heir will bind himself, yet it will not bind the succeeding heir (1 *Anstr.* 11.), that is, if the estate do not fall during the lifetime of the contracting heir; but if the ancestor dies in the lifetime of the contracting heir, and the estate descends on him, then his heir will, it is conceived, be bound specifically to perform the agreement of the person from whom he derives title, and every conveyance is an implied contract for this purpose. See more on Possibilities and Estoppel, 1 *Fonbl. Tr. Eq.* ch. 4. s. 2. 1 *Madd.* ch. 549. 2d edit. *Hooper* v. *Rossiter*, 1 *M'Lel.* 527.

CHAP. XIX

OF AN EQUITY OF REDEMPTION.

IF a person convey lands to another on condition, as a security for money, and the condition be broken, he may, under certain circumstances, *redeem* the premises; and this privilege is denominated his *equity of redemption.* (a)

2 Bl. Com. 158
Powell on Mortg. passim.
Butl. n. (1) to *Co. Litt.* 205 a. & (1.) to 208 a.

(*a*) The equity of redemption continues open for twenty years after the last acknowledgment of it: beyond that time the mortgagor is for ever barred of relief in equity. At law he has lost the estate by non-performance of the condition; and he loses it in equity by allowing the mortgagee to remain in possession for twenty years without demanding an account or obtaining from him some acknowledgment of the existence of the mortgage. At law, sixty years are allowed for the prosecution of particular claims to real estate. In equity, the remedy is for ever lost by twenty years acquiescence in the adverse enjoyment of another person. "The lapse of twenty years" observes that eloquent Judge Sir Thomas Plumer, "affords a substantive insuperable plea in bar: it is the fixed limit to the remedy—the *tempus constitutum:* one day beyond is as much too late as one hundred years: this is the peremptory inflexible rule at law, fixed by positive statutes, if there has been adverse possession, and no disability or fraud: no plea of *poverty, ignorance,* or *mistake,* can be of any avail: however clear

Such equity of redemption may be *released* to the mortgagee. Sometimes, indeed, the conveyance called *a lease and release* is adopted for

and indisputable the title, if the merits could be inquired into, however demonstratively tortious and wrongful the adverse possession, the fact of such possession, and the time, preclude all investigation of the title: the door of justice is closed: the claimant cannot be heard to shew his title: it is a decisive answer to him that he comes too late: that alone is the bar: his title remains, but he has lost his remedy." *Cholmondeley* v. *Clinton*, 2 *Jac. & Walk.* 139.

As to the mortgagor's equity to redeem, *that* depends as much on the conduct of the mortgagee as on the supineness or diligence of the mortgagor. If the mortgagor can shew that the mortgagee has within a period of twenty years acknowledged the existence of the mortgage, the estate will continue redeemable for a further period of twenty years from the date of such acknowledgment. Thus if the mortgagee has alluded to the mortgage as a redeemable interest in a letter to a friend, (*Fenwick* v. *Reed*, 6 Madd. 8.) (such letter proving itself, *ib.*)—in a settlement between third parties, (2 *Cox's Ch. Ca.* 291.)—in a surrender, to which neither the mortgagor nor his heirs are parties (*Hansard* v. *Hardy*, 18 *Ves.* 455.)—in an assignment wherein the estate is treated as subject to redemption, (*Smart* v. *Hunt*, 4 *Ves.* 478 n. a.)—in an answer in Chancery. (*Procter* v. *Oates*, 2 *Atk.* 140.)—by a recital in a deed (*Carew* v. *Johnstone*, 2 *Sch. & Lef.* 295.)—in a devise, such as "all my mortgaged estate," or in words of like import, (*Anon.* 3 *Atk.* 314.)—by a demand of the principal money or a *receipt* of interest, (*Trash* v. *White*, 3 *Bro. C. C.* 289.)—by an *account* kept, (*Vernon* v. *Bethell*, 2 *Eden. Rep.* 114.)—stated, (1 *Pow. Mortg.* 370.)—settled, (*Anon.* 2 *Atk.* 533.)—or promised. (1 *Pow. Mortg.* 370, n. B.)—these and the like references to the mortgage, will be sufficient to keep alive the

the transfer of such interest; but then the latter species of conveyance does not operate as a lease and release with respect to the equity, as a person *cannot be seised of an equity to an use;* and consequently, as no use arises by the bargain and sale, the release can only operate, with respect to the equity, as a mere or proper release; just as it would have done *without* such a bargain and sale, or lease for a year.

The conveyance by lease and release is, therefore, adopted for caution only; as, *in case there be an equity* only in the person intending to con-

equity of redemption for the period of twenty years from the time they are made. The *mere demand* however of an account on the part of the mortgagor, without process or acknowledgment, (*Hodle* v. *Healy*, 1 *Ves. & Bea.* 540)—or an account stated without the authority of the mortgagee, (*Baron* v. *Martin*, *Coop. Rep.* 192.)—or a devise in the words abovementioned after a foreclosure or a conveyance of the equity of redemption. (*Silverschildt* v. *Schiott*, 3 *Ves. & Bea.* 45.)—will not take the case out of the rule. Some of the books seem to suggest that a *continued acquiescence* by the mortgagee in the mortgagor's right to redeem, is requisite to keep alive the equity. But it is observable, that any one of the acknowledgments just mentioned will singly confer a right of redemption on the mortgagor and his heirs for a period of twenty years from the time such acknowledgment is made, and for a further period of ten years beyond that time, if the mortgagor or his heirs be infant, lunatic, under duress, beyond sea, (not having absconded. *Jenner* v. *Tracey*, 3 *P. Wms.* 257, n. (B.),) or under any other legal disability. 1 *Pow. Mortg.* 389.

vey, such release will operate *as a common* release, and so pass it to the mortgagee, notwithstanding the bargain and sale; and *in case there be any legal freehold, interest, or estate, left in the mortgagor,* by reason of any defect in the mortgage deeds, *then* the bargain and sale will operate on such legal interest or estate, and, with the release, pass that also.

See 3 *Bro. Ch. Ca* 289. Trash *v.* White.

In like manner, as a court of equity considers a mortgage, though in fee, merely *as a security for money* till the time of redemption be past, the mortgagor frequently disposes of his own equity, or right of redemption, to a stranger. This can properly be only by way of *assignment, grant,* or *devise;* for he *cannot* pass it by *feoffment, bargain and sale,* nor, consequently, by *lease and release,* as the seisin, or legal estate, *is in the mortgagee;* though the lease and release are often adopted for the reason before noticed with respect to the conveyance of such an equity to the mortgagee in possession.(*a*)

(*a*) If a mortgage in fee be made *before* marriage, the wife will not be entitled to dower of the equity of redemption. Dower is a mere legal right; and by a strange anomaly not allowed in equity. So if a mortgage for a term be made *before* marriage, the mortgagor's wife will not be entitled to dower as against the mortgagee. If the mortgage be made *after* marriage, she will of course take precedence of the mortgage, whether it be in fee or for years, unless she concurred in the mortgage by fine or recovery; and then she will be deprived of her dower to the extent of the mortgage, but no farther: a

fine or recovery on the occasion of a mortgage being a partial —not an absolute bar of dower. As to a mortgage in fee made before marriage she cannot redeem, having no interest in the equity of redemption; but as to a mortgage by demise made before marriage, she is entitled to be endowed of a third part of the rent, and a third part of the reversion; and that interest will enable her to redeem, which having done, she will stand in the situation of an ordinary tenant for life paying off an incumbrance, and must pay one third of the interest on the mortgage money, and her proportion of the principal, if the heir sues to redeem the mortgage in her hands in her lifetime. Suppose an estate, yielding £180 a-year, to be mortgaged for a term of years before marriage for £1200, at 5 per cent. (the interest of which will be £60 a year), and the husband dies, leaving a widow and a son: the widow will be entitled to a third part of the pepper-corn rent reserved on the mortgage term, and to a third part of the reversion of the immediate freehold and inheritance of which her husband died seised in possession. On a writ of dower at law she would obtain a verdict; but it would be with a *cesset executio* during the term. Her remedy at law, therefore, would in the end be fruitless. But having a right to redeem, she may pay off the mortgage money, and take an assignment of the term to herself; and afterwards file a bill against the heir to compel him to redeem or stand foreclosed. He would of course redeem if the estate were not overburthened by the mortgage. In a Court of equity he would not be allowed to set up the mortgage term as against the widow, for the estate was burthened by their common ancestor: and good conscience dictates that they should bear the burthen created by the author of their respective rights in proportionate shares. The widow is entitled to one third of the estate for her life, and a tenant for life is only bound to keep down the *interest* on prior charges; if the principal be paid off, he must contribute in proportion to the benefit he derives from a cessation of the annual payments of interest during his life, which is measured by the value of his life, his age, constitution, &c.—

a reference being made to a Master in Chancery to ascertain the exact proportion. By redemption the widow will obtain a third part of the rent minus a third part of the interest; and the yearly account will stand thus:

	Widow.	Heir.		Total.
	$\frac{1}{3}$	$\frac{1}{3}$	$\frac{1}{3}$	
	£	£	£	£
Rent -	60	60	60	180
Interest	20	20	20	60
	40	40	40	120

Hence, by redeeming, the widow will be benefited £40 a-year. If the heir redeem, the widow will be entitled to the whole principal money; deducting the probable gross amount of interest which she would be bound to pay during her life. After redemption she would of course be entitled to her whole dower, and these observations apply to all cases of mortgages made by the husband, except in the case of a mortgage in fee made *before* marriage, *then*, on the principle that there is no dower of a mere trust, she will not be entitled to redeem; but if the mortgage be in fee and made after marriage, and in every case of a mortgage for years, whether before or after marriage, or whether the mortgage be satisfied or not, the widow by a circuity may become entitled to a beneficial estate in dower. And it is observable, that a dowress, like an heir or devisee, has a right to have the *personal* estate of her husband, as far as it will extend, applied in discharge of mortgages and other debts contracted by the husband, which are charges on the land whereof the wife is endowable. The authorities for this note will be found in 2 *Pow. Mortg.* 681. 690 a. *et seq.*

CHAP. XX.

* OF USES AND TRUSTS.

IT is necessary to the creation of such an use as may be executed by the statute,(*a*) that there

2 *Bl. Com.* 327. *Butl.* n. (1.) to *Co. Litt.* 271 b. (1.) to 290 b. 384 a. & add. notes.

(*a*) This statute enacts, "That where any person shall be seised of any lands, rents, services, reversions, or other hereditaments, to the use, confidence, or trust of any other person or body politic, by any means whatsoever, every such person and body politic, having such use, confidence, or trust, shall henceforth be deemed and adjudged to be in lawful seisin, estate, and possession, of and in the same lands, &c. with their appurtenances, to all intents and purposes in the law of and in such like estates as they had in use, trust, or confidence, and that the estate, title, right, and possession of the person seised of any lands, &c. to the use, confidence, or trust of any such person, or of any body politic, shall be deemed and adjudged to be in him or them that have such use, confidence, or trust, after such quality, manner, form, and condition, as they had before in or to the use, confidence, or trust that was in them." 27 Hen. 8. c. 10. 1536.

Before the passing of this statute, the use was cognizable in a Court of equity only, and was in fact what a trust is now. Thus under a feoffment to *A.*, to the use of *B.*, *B.* had not a legal estate—that is, an estate which he could sue upon in a Court of law; he had merely a confidence in *A.* to pay over the rents and profits to him *B.*, which if *A.* failed to do,

Booth's Opin. at the end of Touchst. & in 1 Coll. Jurid. 421. Sand. Uses. passim.

be a *person to stand seised of certain heredita-ments to such an use;* that there be *a person capable of taking that use;* and that there be *privity of estate* and *privity of person.*

B.'s remedy was by suit in equity, not by action at law. Hence *A.*'s estate was called the *legal*, and *B.*'s the *equitable* estate. The effect of the above statute was, and still is, to convey the legal estate of *A.* to the equitable estate of *B.*; and contrary to the usual doctrine of merger, it in effect declares, that the legal estate shall merge in the equitable. It first enacts that *B.* shall have the seisin and possession, and then, by a second limb (rather redundantly), declares that *A.*'s legal estate and possession shall be deemed and taken to be in *B.*, in the same condition as *B.* previously had in the use.

From the words of this statute it will be perceived, that it relates to *hereditaments*, and not to *chattels;* that it applies only where *one person is seised to the use of another person*, and not where one person is seised to the use of *himself;* and thirdly, that the *cestui que use* now takes the *legal estate*, which is measured by the previous estate in the use, and not by the previous estate in the *seisin*. Therefore, if a conveyance be made to *A.*, his heirs and assigns, to the use of *B.* in tail, *B.* will take an estate tail, and not an estate in fee; the residue of the use in fee, that is, the reversion expectant on the estate tail will result to the grantor, who will be in of his former estate; so that if he derived that estate from his mother, it will still continue descendible to his heirs *ex-parte materna*. But the seisin must be commensurate with the use. Thus if a conveyance be made to *A.* generally, which will give him an estate for life only to the use of *B.* in fee, *B.* will take but an estate for the life of *A.*, for want of a seisin to support any further interest. *Bac. Uses*, 47. *Cro. Car.* 231. 3 *Bulst.* 184. It sometimes occurs in practice, that a conveyance is made to *A. B.* and *C. D.*, and the survivor of them, and the heirs of such survivor to uses limiting the estate in strict set-

1st, There must be a *person seiscd;* for a *corporation* cannot stand seised to an use; and, therefore, if a corporation convey, it must be by feoffment, lease (with an actual entry,) and re- Sand. 446.

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tlement. In this case, the remainder to the survivor of *A. B.* and *C. D.* is a contingent remainder; and, until the death of one of them, there is no actual vested seisin to serve the uses. This is inconvenient, and should be carefully avoided.

Much doubt was formerly entertained, whether the statute of uses could apply to wills which did not exist in the shape they do now at the time the statute of uses was passed. The mention of wills in the statute of uses, referred only to the customary wills then in existence, and not to those which were introduced a few years afterwards by the statute of wills. Lord Coke says, "It is frequent in our books, that an act made of late times shall be taken within the equity of an act made long before." 4 *Rep.* 4 a. b. And in *Broughton and Langley*, 2 *Lord Raym.* 873. 2 *Salk.* 679, it w s admitted that a devise of lands may by express words be limited to the use of another person than the devisee, and that such devise will be executed by the statute of uses; and in *Thompson* v. *Lawley*, 2 *Bos. & Pull.* 311, the same doctrine was expressly acknowledged. But there is not any necessity for a *seisin* to supply the use in a will, and therefore if the devisee to a use die in the lifetime of the testator, it should seem that the use will not lapse, because it would be as good without that previous seisin as with it; and the Courts will overlook a devise which in event proves to be a mere nullity. 3 *Atk.* 408. 3 *Bro. C. C.* 30. But if there be a devise to one person to the use of another, and the *cestui que use* or beneficial devisee dies in the lifetime of the testator, then it is conceived that the devisee himself will not be entitled to the estate discharged of the use, for the testator has shewn a clear intention that the beneficial interest should not rest with him, by directing it over to another person.

lease, &c. though the courts will, if possible, support a bargain and sale by a corporation as some other species of conveyance rather than that it should avoid its own act. (*a*)

2dly, There must be a person *seised* of *hereditaments*; for *chattels*, whether real or personal, are not within the statute: though a person may stand seised of the freehold to the use of another for a chattel interest; as *A. B.* being seised in fee, may covenant to stand seised to the use of *C. D. for years*; and such use will be executed by the statute. And this is every day seen by the lease, or more properly, by the bargain and sale, upon which a release is grounded. But chattel interests may be conveyed subject to certain *trusts*, as commonly practised. (*b*)

(*b*) If an alien be enfeoffed to uses, the statute executes the use in him until office found: but upon inquisition the use is destroyed by relation, and the King holds absolutely. *Bac.* 59. *King* v. *Boys*, *Dyer* 283 b. pl. 31. So if a person, having committed treason, be made grantee to uses, the use will fail for the benefit of the crown, if the grantee be afterwards attainted. *Throgmorton's case*, *Moor*, 390, 1.

(*b*) It is generally understood that copyhold lands are not within the statute of uses, and consequently that a power to revoke uses once vested cannot be reserved in a surrender of this species of property as it can in a conveyance to uses of freehold. 1 *Watk. Cop.* [198] 265. A late case however has deranged this generally acknowledged doctrine. By marriage settlement freehold lands were conveyed to the use of

the husband for life, with remainder to the wife for life, with remainder to trustees to preservee contingent remainders; with remainder to the children of the marriage, with remainders over. Then followed a provision, that it should be lawful for the trustees, with the consent of the intended wife, to dispose of, and convey either by sale or exchange, the freehold property in question; and that for the purpose of effecting such sale or exchange, they, with the consent of the husband and wife, should be at liberty to revoke the beforementioned uses, and to appoint others in favour of the person with whom the sale or exchange might be effected. The deed then contained a covenant to surrender copyhold premises, the subject in question, to the trustees of the settlement and their heirs, to hold to the same uses and subject to the same powers as were before declared concerning the freehold property. The marriage took effect, and the copyhold premises were surrendered to the uses and subject to the provisions in the indenture of settlement mentioned, and the husband pursuant thereto was admitted to the copyhold premises as tenant for life. In 1805, the trustees contracted to sell these freehold and copyhold estates to Boddington in fee, and for that purpose they, with the consent of the wife, revoked all the uses declared by the said marriage settlement, and limited a fresh and substituted use to Boddington in fee, and the husband surrendered the premises to the trustees, who were admitted, and they afterwards at the same court surrendered to the use of Boddington, his heirs and assigns; and Boddington was thereupon admitted as tenant in fee according to the custom of the manor. Boddington now sold to Abernethy, who objected to the title. On a bill for specific performance, a case was directed for the opinion of the Judges of the King's Bench, on the question:—Whether Boddington was seised of the copyhold premises in fee? The Court of King's Bench took time to consider, and afterwards sent the following certificate:—"This case has been argued before us by counsel; we have considered it, and are of opinion that the plaintiff

(Boddington) has an estate in fee simple at the will of the lord according to the custom of the manor in the said copyhold messuages and hereditaments with the appurtenances." *Boddington* v. *Abernethy*, *K. B. Easter*, 1826.

The reasons for this certificate do not appear, but something very analogous to a power of revocation is discoverable in the common mode of surrendering to such uses as the surrenderor shall by *will* appoint. A will is in its nature revocable, and therefore the surrender is in fact to such uses as the surrenderor shall appoint with power to revoke the uses thus appointed at any period during his lifetime. Nothing is more common than for testators to revoke their wills, yet the last testamentary declaration of the use is always held the governing law of the copyhold title. It may indeed be said that the uses thus appointed are not vested until the testator's death; it is true that they are not to take place in possession till that period, but it is submitted that they are vested the moment a person is named in writing by the surrenderor to succeed to the possession, and so continue until the testator by another writing divests the estate of that appointee and substitutes another. It is not intended to intimate that any estate vests in a devisee of freeholds until the testator's death, but a will of copyholds operates in a very different manner, it is simply a declaration of use, and is perfected the instant it is made, but by the original terms of its constitution it is revocable at pleasure, and may therefore be considered ambulatory till the testator's death. Hence it appears that the succession to copyholds may be regulated by a revocable instrument. The above case carries this doctrine one step farther, and decides that the legal estate in possession of copyhold property may be revoked by a power reserved in the surrender creating that estate. It is very possible that this certificate will receive further discussion as the subject is so very ample and the opinions of eminent lawyers upon it are so conflictory. See 1 *Walk. Cop.* 137. 256. 4th edition.

3dly, There must be a person *capable of receiving the use*; (*a*) and, therefore, a limitation to the use of a corporation would not be good without licence, as it would be within the statutes of Mortmain.

4thly, There must be *privity of estate*; for he who comes in in the *post*, or paramount the person limiting, shall not be subject to it. (*b*)

(*a*) It is not essential that such person be *in esse*, but there must be a probability, or at least a possibility, of his coming into being within the time prescribed by the rule against perpetuities. Hence contingent uses are within the statute, and give legal interests of like quality to the use. *Sug. Pow.* 18. 28. *Bac. U.* 51. 92. *Rowes Ed.* 131.

(*b*) Prior to the statute of uses (27 Hen. 8. c. 10.) the mode of evading the common law restraints on testamentary disposition (the statute of wills not being enacted till the 32d year of the same reign) was by making a feoffment to *A.* his heirs and assigns, to such uses as the feoffor should appoint. The appointment usually contained a power of revocation when it did not confer an immediate interest, so that the power was in fact kept open till the appointor's death. In effect this mode of evading the common law was equivalent to the will of the present day, and was generally used in the same manner and for the same purposes. With reference to the text, if *A.* the feoffor died without heirs the legal estate in him escheated to the lord of the manor whereof the lands where holden; and all lands whether freehold or copyhold, were then as well as now, holden of some manor. As between the lord and the *cestui que use* there was neither privity of estate or person; it was on the seisin of *A.* and his heirs that the use was raised; *that* seisin having failed, the use fell to the ground. The

1 Fearne 479. 5thly, There must be a *privity of person;* for a purchaser *without notice* shall not hold charged. (*a*)

There cannot be *an use upon an use.* If an estate be limited to *A. B.* and his heirs, to the use of *C. D.* and his heirs, to the use of *E. F.* and his heirs, the statute shall execute *only the first*

heirs and assigns of the feoffee came in the *per*, that is, *by* or *through* him, and were bound by the privity and confidence which subsisted between their ancestor and the *cestui que use*, but the lord by escheat came in by title paramount and was therefore said to claim in the *post*, that is, beyond or without such privity, and he consequently held discharged of the use and confidence which he never agreed to. But now the seisin and use, the moment they are created, are instantly united by the operation of the statute of uses, and therefore the requisition in the text is at this day merely nominal.

(*a*) That is, a purchaser for valuable consideration. A volunteer without notice of the use, and a purchaser for value with actual notice of it, were equally bound to render the profits of the land to the *cestui que use* and to convey as he should appoint; but since the statute this distinction as to uses is almost nugatory. As to trusts, which at present occupy the exact situation of uses formerly, this and the preceding rule might be applicable; but as uses are now seldom allowed to wait in contingency, and do moreover result or vest subject to be divested under the doctrine of *scintilla juris*, these two rules are of very limited operation. In the common uses to prevent dower the conveyance is to *A.* and his heirs to such uses as he shall appoint, but until appointment uses are limited to himself for life, with remainders over; the uses arising by appointment are consequently more in the nature of alternate than suspended uses.

use, or that to *C. D.*, and the limitation to *E. F.* will be only *a trust* in equity. *

* If the limitation to *E. F.* and his heirs be intended as *a trust*, it would be prudent to give the estate to *A. B.* and his heirs, to the use of *C. D.* and his heirs, in trust for *E. F.* and his heirs; for if it be given to *A. B.* and his heirs, *to the use of himself* (A. B.) *and his heirs*, to the use of, or in trust for *E. F.* and his heirs, it might be open to the objection, that *A. B.* would be *in by the common law;* and so the limitation of the use *to him and his heirs* be nugatory; and that, consequently, the limitation to *E. F.* would, in such case, be, in fact, *the first use*, and executable by the statute; and consequently, that *E. F.* would take *the legal estate* to him and his heirs.—Now, whether such objection could be supported or not, it would be highly proper to obviate it by limiting the estate to *A. B.* (an indifferent person) and his heirs, *to the use of* C. D. AND E. F. (the trustees) *and their heirs*, to the use of, or rather in trust for *G. H.* and his heirs, as then the use to the trustees would be executed, and the legal estate would, unquestionably, be in such trustees; and, consequently, any subsequent limitations would be inexecutable by the statute.—*Note by Mr. Watkins.*

Mr. Sanders in explaining the construction of the statute in this respect observes, that before the statute real property was divided into use and possession: but there was no third kind of interest then known; consequently when the seisin was transferred to *A.* and his heirs, and it was added "*to the use* of him and his heirs," he had both the legal and beneficial interest, and there was nothing in the statute to alter the nature of his estate. 1 *Sand. Uses*, 93. Mr. Sugden supposes that in a conveyance *to and to the use of A.* in trust for *B.*, that the use to *A.* is executed by the statute, *because the use to B. is void* (*Sug. Pow.* 130. *3d edit.*), but that learned gentleman's sentiments on this subject are not clearly developed, nor are they adopted by the profession. It is now

2 Bl. Com. 336. Upon this principle, however absurd in itself,* many important doctrines are founded. Hence, if it be wished that a person shall have only *a trust estate*, care should be taken to limit a preceding, and at least commensurate, use, so as to be executed by the statute; as, "to *A. B.* and his heirs, *to the use of him and his heirs during the life of C. D.* in trust for *C. D.* and from and after the decease of the said *C. D. to the use of the heirs of the body of the said C. D.*;" when *C. D.* would take a trust or equitable estate only; and the remainder to the heirs of his body would be a proper use, executed by the statute the moment he died. And the estate to him being equitable, and that to his heirs legal, could not unite; and so the latter would not be barrable by him.

Hence also an use cannot be limited on *a bargain and sale* to any but the *bargainee;* for, till

generally acknowledged in accordance with the opinion of Mr. Booth, that in a conveyance to *A.* and his heirs to the use of *A.* and his heirs, *A.* is in by the common law, (2 *Ca. & Opns.* 281.), and it being a strict rule of law *that a use cannot be limited on a use*, whether the prior use be by common law or by statute (*Tippin* v. *Cosin*, *Comb.* 313.) it follows that a superadded use on a common law use cannot be recognized in a court of law. But a court of equity takes cognizance of the superadded use and will see it performed under the name and character of a Trust.

* See the *Introduction*, p. xi. xii.

enrolment, the bargainee himself has but an use, and he cannot be seised of an use to the use of another person ;(a) and the limitation over would

(a) If a will be made between the date of a bargain and sale, conveying the property to the testator, and the enrolment of that bargain and sale, a question arises, whether the testator can be said to be *seised* of the estate at the date of his will, if he dies before enrolment, supposing enrolment to be made within due time after the execution of the bargain and sale. Jones, J., conceived, that *in rei veritate*, the *bargainor* is seised until enrolment; for until the words of the statute 27 *Hen.* 8. *c.* 16. be complied with, *viz.* "that the deed be enrolled," nothing passes to the bargainee; and he cited the case of *Bellingham* v. *Alsop*, *Cro. Jac.* 52., where it was held, that if a bargainee before enrolment bargains and sells the land to another person before enrolment of the first bargain and sale, and then both instruments are enrolled consecutively, the second bargain and sale will be void, because there is nothing in the secondary bargainor at the time of the bargain and sale; and of that opinion was Hyde, C. J.; but Croke, J., conceived, that if the enrolment be made within the prescribed time, the bargainee will be in *ab initio*; for the statute of uses is to be considered, as executing the possession to the use at the date of the deed; and therefore the bargainee will be in as from that period. *Flower* v. *Baldwin*, *Cro. Car.* 218. On the other hand, it is observable, that a fourth resolution in *Iseham* v. *Morrice*, *Cro. Car.* 110., was, that where a bargainee, after the execution of the indenture of bargain and sale, but before enrolment, lets the land for years, and the indenture is enrolled within the six months, yet the lease is void, and *the relation of that enrolment shall not make it good.*

However, it is considered clear from other adjudications, and particularly from *Dimock's case*, *Hob.* 136., where the *heir* of the bargainee was adjudged entitled to lands conveyed

be a trust; and so, as to a *covenant to stand seised*. If, therefore, it be intended that a third person should take an use executable by the statute, some other species of conveyance (as a *fine*, *feoffment*, or *lease and release*) should be had recourse to.

An use need not take effect immediately on the creation of the deed, like an estate of freehold. It may commence *in futuro*; for the

to his ancestor by bargain and sale, enrolled after the ancestor's death; that the *devisee* will be held entitled to lands under a will made in the interval between the date of the bargain and sale and its enrolment; for that the estate vests presently by the statute of uses, and not by the statute of enrolments, except where the bargain and sale is made by commissioners of bankrupt: in that instance nothing passes till enrolment. *Bennett* v. *Gandy*, *Carth.* 178. Hence it appears, that the devise takes effect, not under the doctrine of relation, but by reason of the statute of uses vesting the estate in the bargainee as from the date of the deed, whereby the testator is, in fact, seised of the same estate at the date of his will as he is at his death. It is also observable, that the bargainee is so far in the seisin before enrolment as to make him a sufficient tenant to the *præcipe*, which can only be brought against the person in whom the first legal estate of freehold is vested, and a person having that estate must be in the seisin. It is therefore submitted, that the bargainee may stand seised to the use of another person before enrolment of the bargain and sale to himself; and at all events he might make a feoffment under the statute of *Rich.* 3., which enables the *cestui que use* to convey his own estate and the *seisin* of the person who stands seised to his use.

freehold remains in the trustee, or covenantor, or bargainor, who is to answer to the *præcipe* of others, and perform the feudal duties. But the contingency upon which the use is to arise must be such as may happen within a reasonable period, as a life or lives in being, or 21 years afterwards;(*a*) and uses so limited are called *contingent* or *springing uses*, which may be destroyed or defeated *by destroying the estate out of which they are to spring*.(*b*) 1 *Fearne*, 435, 436.

(*a*) Except where the future use is to take effect after an estate tail, as then no danger of a perpetuity will accrue—the tenant in tail having power to bar the estate tail and all remainders future and springing uses dependant thereupon.

(*b*) As if a person in consideration of an intended marriage, covenant to stand seised to the use of himself and his intended wife for life, with remainder to the first and other sons of the marriage in tail, and before the solemnization of the marriage, makes a feoffment in fee, or a lease for life, upon a valuable consideration, to a person who has no notice of the covenant, the uses to arise upon the marriage will be destroyed, because the seisin to feed them has been swept away by the feoffment. 2 *Sidf.* 64. 2 *Roll. Abr.* 769. *Cro. Jac.* 168. But this doctrine is now principally applicable to covenants to stand seised, and uses arising under powers, which are clearly not exercisable, if the privity between the seisin and the use be destroyed by disseisin. This subject involves much technical learning connected with the unsettled doctrine of *scintilla juris*, and is treated of in *Cru. Uses*, 154. 1 *Sand. Uses*, 146. 4th ed. *Cornish Uses*, 135. Between contingent and springing uses there is this difference,—a contingent use depends on an uncertain event

See as to shifting the second estate on the accession to the family estate, *Butl* n. to *Co. Litt.* 327 b. 328.

An use may also be limited so as *to change after execution, to another person;* as to the use of *B.* for life, remainder to his first and other sons in tail, remainder in fee; *provided that if there be no issue living at the death of B.* then to the right heirs of *C.* for ever. And this is called a *shifting* or *secondary* use; but like the latter it must take effect, if at all, within a life or lives in being or one and twenty years afterwards.

If such shifting use be limited on an estate

—a springing use depends on an event which is morally certain of happening. Thus, under a conveyance to *A.* and his heirs, to the use of *B.* and his heirs from and after next Michaelmas, the use to *B.* is future and springing, but it is not contingent. Till next Michaelmas the use results to the grantor—on the arrival of the time it shifts to *B.* But if the conveyance had been to *A.* and his heirs, to the use of *B.* and his heirs from and after next Michaelmas *provided B. be then living*, this on the face of it is a contingent use. Contingent uses also engender the doctrine of *scintilla juris*, as above hinted, which may be shortly explained thus:—suppose a feoffment be made to *A.* in fee, to the use of *B.* during his life, with remainder to the use of his sons (unborn) successively in tail; and for want of such issue to the use of *C.* in fee. The remainders to the sons are contingent uses, and are therefore unexecuted; yet being in truth nonentities, they do not impede the vesting and execution of the ultimate use in *C.* But the books say, that as there is a possibility of the intermediate uses arising, the releasee retains a small particle of estate for the purpose of supplying those uses with a seisin when they come into being. 1 *Ld. Raym.* 203. 1 *Salk.* 224. *O. Bridg.* 382.

in fee, it cannot be destroyed or barred by the previous taker; but, if on a limitation *in tail,* it may.

And so with respect to *trusts:* some are completely established, and so as to take effect immediately, by the very deed which conveys the legal estate to the trustee, and are, therefore, frequently called trusts *executed;* while others are to be carried into execution by some future act to be done by the trustee; and these are often denominated trusts *executory.* The *first* species of trusts *have the same construction as legal estates;* while the *latter are carried into execution so as best to answer the intention of the person creating them.* (*a*) 1 *Fearne,* 205.

(*a*) Of this character are *covenants* to assign or surrender leasehold or copyhold lands to certain trustees, upon trusts to correspond with uses previously limited of freehold estates. But an assignment or surrender actually made to trustees upon trusts to correspond with uses of freehold property would, it is apprehended, confer trusts *executed.* The distinction between trusts executed and trusts executory is, that the former cannot afterwards be varied by the interference of a Court of equity, whereas trusts *executory* are liable to be altered or modified by a Court of equity whenever they do not technically carry into execution the presumed object of the parties. On this ground all covenants to surrender copyhold estates on trusts, must be considered executory and liable to be moulded or remodelled according to the nature of the transaction and the manifest intention. Indeed, all covenants participate very deeply in this execu-

When an use is wholly or partially undisposed of, it shall result to the grantor.

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tory character. "At law, a covenant must be strictly and literally performed: in equity, it must be really and substantially performed according to the true intent and meaning of the parties as far as circumstances will admit," 3 *Ves.* 692.

In the Duke of Newcastle *v.* Lincoln, 3 *Ves.* 387. a conveyance of freehold estates was made in consideration of marriage to uses in strict settlement, with a covenant to assign leasehold estates to trustees, "in trust for such person or persons, and for such other the like ends intents and purposes, as were thereinbefore mentioned of and concerning the said freehold messuages, &c. as far as the law would in that case permit." Lord Rosslyn thought, that the settlement should be so framed, that no person being tenant in tail by purchase should become entitled to a vested interest in the leasehold estate until he attained twenty-one or died under that age, leaving issue inheritable to the entail, 3 *Ves.* 387. On appeal, the Lord Chancellor observed, that a Court of equity would give a construction to an excutory covenant of this kind, agreeably to what would have been the direction of a conveyancer consulted by the party; and alluding to the distinction between trusts executed and executory, his lordship added, that if the party would be his own conveyancer and *create the estate*, the Court had no jurisdiction to alter that estate so created by the party himself: but upon such a covenant as this, the Court had jurisdiction to execute the intention when it could see it: citing *Gower* v. *Grosvenor*, *Barn. Ch. Ca.* 54. 12 *Ves.* 218; See also 1 *Jac. & W.* 570. 1 *Sand. U.* 310. *4th ed.* 2 *Watk. Cop.* 307, 313.

In the case of articles of agreement made in contemplation of marriage, and which are consequently preparatory to a settlement, and in the case of wills which are merely direc-

The *cestui que trust* may transfer his interest over to a stranger; and if such *cestui que trust* be tenant in tail in possession, he may even suffer a *common recovery*, though there be no Pigott, 104. 1 Coll. Jurid. 214. 3 Ves. Jun 120. 1 Cru. 187.

tory of a subsequent conveyance, the trusts declared by them are said to be executory because they require an ulterior act to raise and perfect them. They are rather considered as *instructions* for settlements than as instruments complete in themselves, and the Court of Chancery in order to promote the presumed views of the parties in the one case and to support the manifest intention of the testator in the other, will attach to the words expressive of the trusts a more liberal and enlarged construction, than it would do if the words were contained in a limitation of a legal estate or a trust executed. 1 *Sand. U.* 310. *4th ed.* Thus in *Jervoise* v. *Duke of Northumberland*, 1 *Jac.* & *W.* 570. the Lord Chancellor observed, that where there is an executory trust, as or example, where a testator has directed something to be done, and has not himself, according to the sense in which the Court uses these words, completed the devise in question, the Court of Chancery has been in the habit of looking to see what was his intention; and if what he has done amounts to an imperfection, the Court will mould what remains to be done, so as to carry the intention into execution. His Lordship continues:—There is a good deal of confusion in the expressions "trusts *executory*" and "trusts *executed*." The latter, no doubt, in one sense of the word, is a trust executory; that is, if *A. B.* is a trustee for *C. D.*, *that* is a trust executory in this sense, that *C. D.* may call upon *A. B.* to make a coveyance and execute the trust: but in cases like the above, the testator has clearly decided what the trust is to be and the trust is then said to be executed, and where a trust is executed the Court of Chancery follows the law. 1 *Jac.* & *W.* 570.

legal tenant to the *præcipe*; so he may levy *a fine*. (a)

1 *Fearne*, 483. *Sand*. 261. In certain cases the *cestui que trust* may call in the legal estate; and, by a bill in equity, oblige the trustees to convey.

In some cases it is proper to keep the legal estate outstanding, in order to guard against mesne incumbrances, &c. This is usual with

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(*a*) If an estate be conveyed unto and to the use of *A.* and his heirs, in trust for *B.* in tail, with remainder over, *B.* may suffer an equitable recovery without *A.*'s concurrence, and thus acquire the equitable estate in fee. He may then call upon *A.* for a conveyance of the legal estate, and thereby extinguish the equitable in the legal ownership, of which he will then become seised in fee simple, *Ca. Temp. Talb.* 164, 167. On the other hand, if a trustee, who has the legal estate in fee in trust for a married woman and her heirs, makes his will, and devises this legal estate to his eldest son in tail, with remainders over, a recovery must be suffered by the son before the feme covert or her husband can obtain the dominion over the legal fee. It was not necessary till a comparatively recent period, to suffer a recovery of an equitable estate tail. 1 *P. Wms.* 91. 2 *Vern.* 552. See also 2 *Ch. Ca.* 63. 78. and 1 *Fonb. Tr. Eq.* 303. *5th ed.* Before that period the equitable tenant in tail might have obtained a conveyance of the legal estate from the trustee, which absorbing the equitable estate, was considered as destroying the estate tail. But now a recovery is indispensably requisite. 1 *Bro. C. C.* 70. 1 *Vern.* 13. 2 *Vern.* 132. *Amb.* 518. 3 *Ves.* 120. 16 *Ves.* 224. 2 *Meriv.* 358. *Merest* v. *James*, 6 *Madd.* 118. *et infra*, *Ch. Rec.*

respect to terms of years, which should generally, be kept on foot for the security of the purchaser, and in such cases, carefully assigned to a person of his own nomination in trust to attend the freehold or inheritance. (*a*) It being a rule that, where there is equal equity, he who has the legal estate shall prevail. (*b*)

(*a*) See *ante* Ch. Terms for Years p. 25. for observations on this head. It has lately been decided, that the person who has the best right to call for an assignment of the legal estate, obtains no priority by that right, unless he procures an actual assignment of the term. *Frere* v. *Moore*, 8 *Price*, 475.

(*b*) As if there are several mortgagees on one estate, the last mortgagee having lent his money upon a valuable consideration, *without notice*, may by purchasing the precedent incumbrance *which carries with it the legal estate*, protect himself against any mortgage subsequent to the first, and prior to the last; for by purchasing the first mortgage he obtains the legal estate and he had equal equity with the mesne incumbrancer by having lent his money without notice of his charge; and notice of the mesne incumbrance at the time of buying in the first mortgage will not vary the case. *Bovey* v. *Shipwick*, 1 *Ch. Ca.* 201. *Churchill* v. *Grove*, *ibid.* 35. 1 *Vern.* 187, 188. 2 *Ves.* 573. *Hagshaw* v. *Yates*, *Stra.* 240. But the possession of the legal estate will not make up for the want of *equal* equity, and notice of a prior charge at the time of the subsequent advance will make the equities of two incumbrances unequal. Where a person advances money on an estate which he knows to be already incumbered, he in effect acknowledges that he will claim subordinately to the person who has the prior charge;

Watl. on Desc. 191. 2 Ves. Jun. 120. Brydges v. Brydges, [6 Madd. 118.]

If a trust and legal estate unite in the same person, the former, generally speaking, becomes merged or extinguished.

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and therefore it may be laid down as a general rule, that if the subsequent incumbrancer have notice of the preceding incumbrance *before* he becomes possessed of his own security, nothing he can do will help him, *vide* 2 *Ves*. 485. 684.

A case lately occurred where a conveyance had been made to *A. B.* to uses to bar dower. *A. B.*, on his second marriage, appointed and released the estate to two trustees and their heirs, to the use of himself for life, with remainder to the use, intent, and purpose that his intended wife might thereout receive and take an annuity of 1500*l.* a-year if she should survive the said *A. B.*, and subject thereto to the use of the said *A. B* in fee, but with power for the wife, notwithstanding her coverture, to levy and raise the sum of 2000*l.* out of the estate for the use of the children of the intended marriage, and to appoint any term of years therein to any person for better raising the same as she should think fit. On the solemnization of the marriage, the settlement was handed over to the wife, who kept it in her own bureau, but the husband retained the title deeds and the conveyance to himself in fee. A year or two afterwards the husband borrowed a sum of 3000*l.* on the estate, which he represented to be free from incumbrances. The mortgagee had no notice of the settlement, and it was not necessary for him to inquire about the dower of the borrower's wife, as the conveyance to him was to the common uses to bar dower. Sometime after the husband became bankrupt, when the mortgagee made his appearance and commenced an ejectment for recovery of the estate. After the bankruptcy the wife exercised her power of appointment, limiting the estate to a trustee for a term of five hundred years, in trust by sale or mortgage to raise the sum of 2000*l.* The term was limited to commence the day after the marriage. The mortgage was in

In conveyances creating trusts there should be clauses enabling the trustees to deduct expences; and sometimes an express allowance should be given them for their time and trouble; that they shall not be answerable for monies not actually received by them, or for what shall be lost without their fault. (*a*) It is frequently necessary

fee. The husband being tenant for life the legal estate for his life clearly passed to the mortgagee. On the husband's death it was considered that at law the trustee of the term would be entitled to recover in ejectment; but in equity, it was thought that the mortgagee, being in the character of a purchaser for valuable consideration without notice would be entitled to an injunction to stay proceedings against him at law, on the ground that the trustees of the settlement had been guilty of negligence in permitting the husband to retain the possession of the title deeds; but this opinion was given with some reservation,—the late case of *Harper* v. *Faulder*, 4 *Madd.* 129. being taken to qualify the general doctrine laid down in 2 *Black. Com.* 160. *n.* respecting the degree of negligence necessary to postpone a person for not taking the title deeds. See also *Strode* v. *Blackburne*, 3 *Ves.* 222. and 1 *Pow. Mortg.* 57 *a* 473. 2 *ib.* 637.

(*a*) Also, that their receipts should be good discharges; and that all persons paying them monies and taking such receipts, should not be required to see to the application of the money therein expressed to be received; also, that it shall be lawful for the trustees to invest any monies remaining in their hands not immediately applicable to any of the purposes of the trust, in the funds, with power for them to alter and vary the securities as they shall think fit, and a provision for the change of trustees as occasion shall require. In the last session of Parliament an

also to give them power, either with or without consent, to sell or exchange the lands, or transfer stock, &c. (*a*)

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act was passed consolidating and amending the laws relating to conveyances and transfers of estates and funds vested in trustees, who are infants, idiots, lunatics, or trustees of unsound mind, or who cannot be compelled or refused to act. 6 *Geo.* 4. *c.* 74.

(*a*) In conclusion it may be observed, that the investment of trust-money on personal security without an express provision empowering that act is a breach of trust; but it is established by all the cases, that if the *cestui que trust* joins with the trustees in that which is a breach of trust, knowing the circumstances, such a *cestui que trust* cannot afterwards complain of the breach of trust; and either concurrence in the act, or *acquiescence* without original concurrence, will release the trustees: but that is only a general rule, and a Court of equity will inquire into the circumstances which induced concurrence or acquiescence; recollecting in the conduct of that inquiry, how important it is on the one hand, to secure the property of the *cestui que trust;* and on the other, not to deter men from undertaking trusts, from the performance of which they seldom obtain either satisfaction or gratitude. *Walker* v. *Symonds*, 3 *Swans*. 58. 64.

CHAP. XXI.

OF POWERS.

A POWER is an authority expressly reserved to the grantor, or expressly given to another, to be exercised over lands, &c. granted or conveyed at the time of the creation of such power.(*a*) *Butl.* n. (1.) to *Co. Litt.* 342 b. & add. n. to 271. *Booth's Opin.* at the end of *Touchst.* & 1 *Coll. Jurid.* 421.

(*a*) It is either a common law authority, or (in the more usual sense) an authority deriving its effect from the statute of uses. It is of the latter kind that the author treats in this Chapter. Of the former may be instanced an authority to sell lands given to executors to whom no estate is devised, and the powers conferred by particular statutes, as the Land Tax Acts, the Act enabling the Remembrancer of the Exchequer to convey lands extended, &c.; and it has lately been decided, that if a will contain a general direction to sell land, and it is not stated by whom the sale is to be made, if the produce of the sale is to be applied by the executors in the execution of their office, they will be considered as having the power of sale, and will be enabled to make a good conveyance of the legal estate in fee without the concurrence of the testator's heir at law. *Tylden* v. *Hyde*, 2 *Sim. & Stu.* 238. *Bentham* v. *Wiltshire*, 4 *Madd.* 44. *Sowarsby* v. *Lacy*, 4 *Madd.* 142. *Patton* v. *Randall*, 1 *Jac. & W.* 189. From these cases it is inferred, that where real *and personal* estate is directed to be sold, and the money applied to purposes not necessarily connected with the executorial office, yet if the money arising from the sale of both estates be directed to form one consolidated fund, the produce of the real estate is *inse-*

Powell on Powers. 2 Fearne, 331. &c. in note. Sand. Uses. 288, 303. 531—555.

Powers are either *collateral*, or *relating to the land*; and those *relating to the land* are either *appendant* (or *annexed to the estate*) or in *gross*.

Collateral powers are those which are given to *strangers*; that is, *to persons who have neither a present nor future estate or interest in the lands.* (*a*)

Powers *relating to the land* are those reserved or given to persons who *have either a present or future estate or interest in the lands.* Those

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parable from the produce of the personal estate; and as the latter is in its natural course to pass through the executors' hands, so therefore, the produce of the real estate must be subject to the same administration, and of a consequence that this loose devise not only empowers the executors to *sell*, but also to *convey* the legal estate in the realty to a person in fee. It is also to be inferred, that if the testator had directed the residue of his landed property only to be converted into money, and the produce applied upon the above trusts, the heir at law, on whom the legal estate would have descended, would have been the proper person to make the sale; in short, that he would have taken the estate clothed with a *trust* for the objects described. In all cases of mere authorities, it is prudent to obtain the concurrence of the testator's heir at law, if he can be prevailed on to join in the conveyance.

(*a*) Collateral powers (correctly defined by the Author) are by some called, powers 'simply collateral,' or 'powers not coupled with an interest,' or 'powers not being interests.' These terms have been adopted, to obviate the confusion arising from the circumstance, that powers in gross have been by many called, 'powers collateral;' an instance of which occurs in *Savile* v. *Blacket*, 1 *Pr. Wms.* 777.

appendant, or annexed to the estate, are where a person has an estate in the land, and the estate to be created by the power is to take effect in possession *during the continuance of the estate to which the power is annexed;* as to make leases.

Those in gross, are where the person to whom they are given has an estate in the land, but the estate to be created under, or by virtue of, the power is not to take effect *till after the determination of the estate to which it relates;* as to jointure an after-taken wife.

Great care should be taken in the creation of powers, as the appointor can only act according to the authority given.* If power be given *to husband and wife,* the *survivor cannot appoint;* and, therefore, if it be intended that the survivor should appoint, such power should be expressly given "*to the survivor of them.*" If a power be given to *A. B.* to appoint by *deed,* he cannot appoint by will; and therefore, if it be meant that he *should* appoint by will, it should be so said. (*a*) *Comp.* 260. [10 *Ves.* 370. 15 *Ib.* 596. 2 *Vern.* 376. 3 *Bro. C.C.* 310.]

(*a*) Nor can a power to appoint by will be executed by deed (*Reed* v. *Shergold,* 10 *Ves.* 370. *Heatly* v. *Thomas,* 15 *Ves.* 596.), unless the deed be in its nature testamentary. *Habergham* v. *Vincent,* 2 *Ves. Jun.* 231. But a power to appoint by 'any writing,' or 'any instrument,' may be exercised by deed or will (*Roscommon* v. *Fowke,* 6 *Bro. P. C.* 158.); so where the power is general without any mode being prescribed. *Ex parte Williams,* 1 *Jac. & Walk.* 93.

If the power be simply to designate a person, or the like, it should not be clogged with many ceremonies; but, if collusion or influence be feared, it would be proper to throw certain ceremonies in the way; as to require three or four witnesses, "*not being menial servants,*" or the like.(*a*)

(*a*) No particular ceremonies are prescribed by law for the valid execution of powers. A power may be given to be exercised by note in writing, or by will unattested. *Wilkes* v. *Holmes*, 9 *Mod.* 485. *Hawkins* v. *Kemp*, 3 *East*, 439. But a person cannot reserve to *himself* a power to appoint real estate by will attested otherwise than according to the statute of frauds (*Habergham* v. *Vincent*, 2 *Ves. Jun.* 231.); and where the power affects real estate and is to be exercised by 'will duly executed,' or by 'will' only, the will must be executed according to the statute. *Longford* v. *Eyre*, 1 *P. Wms.* 740. The ceremonies usually prescribed are, that the deed or instrument by which it is exercised should be sealed and delivered by the appointor, in the presence of and attested by two or more credible witnesses; or where a power to appoint by will is given, that it shall be signed and sealed by the testator, in the presence of and attested by three or more credible witnesses. The donor of the power may, however, clog the execution of it with any ceremonies his caprice may dictate, all of which must be strictly complied with, unessential and unimportant as they may be in themselves. *Hawkins* v. *Kemp*, 3 *East*, 430. Hence, the instrument by which the power is executed, should detail the ceremonies required, and notice the compliance with them; and in some cases this is indispensible, as when a deed is required to be *signed* as well as sealed and delivered in the presence of and attested by witnesses, each of these facts must be noticed in the attestation of the deed. *Wright* v.

Again; it should be considered whether the estates to be taken under the power, when executed, are to be estates *in possession,* or mere *trusts:* if the *former,* the estates should be conveyed by the deed creating such power to the trustees and their heirs, *to such uses as A. B. shall appoint;* and then, on the appointment, *the statute will execute the use;* if the *latter, the legal estate should be placed in the trustees;* as to *A.* and his heirs, *to the use of B. and C.* (the trustees) *and their heirs,* to, and upon such trusts, and for such estate or estates, ends, intents, and purposes, as *D.* shall appoint, as the use would then be *executed in the trustees,* and the estates taken under the appointment would be *trust estates* only.(a)

Wakeford, 17 *Ves.* 451. So also the attestation of a will must notice the publication, if that ceremony be required by the power. *Stanhope* v. *Ker,* 2 *Sim. & Stu.* 37. An act of parliament (54 *Geo.* 3. *c.* 168.) was passed shortly after the decision of *Wright* v. *Wakeford,* confirming appointments executed before the passing of the act, notwithstanding the omission to express the fact of signature in the attestation where that ceremony had been required by the deed reserving the power. But as this act is retrospective only, it is advisable to frame the power so as not to require the signature of a deed, or the publication of a will by which it is to be executed.

(a) Limitations made by virtue of a power are in effect springing uses, dependant on the seisin created by the deed reserving the power. An appointment conveys no estate; it

2 Ves. 610. Alexander v. Alexander, 4 Ves. Jun. 681. Crompe v. Barrow.

By a power to appoint to *children*, the appointor cannot give an estate to *grand-children*.

merely designates a use and a person to take it, in exercise of a right reserved by the grantor to himself, or granted by him to another person; which use, when raised, the statute immediately executes. And the appointee having no estate from the appointor, is said to take under the grantor by the deed which gave the appointor his power. *Rouch* v. *Wadham*, 6 *East*, 303. Appointments, in exercise of common law authorities, have a different operation, the appointee under them taking a legal estate, on which a use may be declared. In this point consists the principal distinction between common law authorities and statutable powers. Thus, under a power of the latter description, an appointment to *A.*, to the use of *B.*, gives *A.* the use or legal estate, and *B.* a mere trust; but under a similar appointment in exercise of a common law authority, *B.* takes the use, which the statute immediately executes, and *A.* retains nothing.

In the case of a conveyance to *A.*, to such uses as he shall appoint, *A.* may delegate his power to *B.*, by conveying to such uses as *B.* shall appoint. That such an exercise of the power is valid, is easily explained.—Estates arising from the execution of powers being in the nature of springing uses, the seisin which is to supply them is not disturbed until some use is actually raised; thus, in the instance given, *A.* points out no certain use on which the statute can operate; and the seisin remaining undisturbed, his appointment amounts only to a delegation of his power to *B.*, which, as no confidence for the benefit of another was reposed in *A.* on the creation of the power, there is no rule to prevent him doing, and the statute is not called into operation until some certain use is designated by *B.* or some future delegatee of the power, so that the final use may remain unappointed for an indefinite period of time, and no perpetuity can arise from this, because uses are vested till appointment, and the power dies with the person.

If the grand-children are to take therefore, it should be provided for: that, in case *any* or *all* of the said children die before the power be executed, leaving lawful issue, then to appoint among the children then living, and the issue of such children who shall then be dead, in such shares, &c.(*a*) See 2 *Ves. Jun.* 357. Routledge *v.* Dorrill.

So if *the appointor* die before execution, the power, as to *discretion*, shall cease; and, therefore, in some instances, it may be prudent to provide for that event: as, in case the said *A. B.* shall happen to die in the lifetime of *C. D.* or before there be issue of *E. F.*, &c. without making any appointment, or only a partial or defective appointment, then the like power as given to the said *A. B.* shall be vested in *G. H.*, &c. Though when an execution is prevented by death, which is an act of God, a court of equity will aid, if it be not merely dependent *upon personal discretion.*(*b*)

(*a*) A power to appoint among children does not authorise an appointment to the executors of a dead child (*Maddison* v. *Andrew*, 1 *Ves.* 57.); but an appointment may be made to a child *en ventre sa mère*, or to the issue of a child, with the consent of the child. *Clarke* v. *Blake*, 2 *Bro. C. C.* 320. *Tucker* v. *Sanger*, 1 *M'Cleland*, 449. A power in favor of younger children excludes a younger son becoming an eldest. *Savage* v. *Carrol*, 1 *Ball & Beatty*, 277. Powers to appoint among nephews are subject to the same rules. *Faulkner* v. *Butler*, *Ambl.* 514.

(*b*) Equity will supply the defective execution of a power

So it is often proper to make the power more general than is usually done: as to such uses, and for such estates, &c. as *A. B.* shall *from time to time* appoint, &c. as *A. B.* may then execute his power *at different times*, and over *different parts of the lands.*(*a*)

Powell, 263. 344.

So provision should be made in case of *no appointment*, or of a *defective or partial appointment:* as, "and in default of such appointment, then as to such part or parts of the said premises, or to such portion or portions of interest in the same, to which such appointment shall not extend, to the use, &c."(*b*)

in favor of a purchaser, creditor, wife, or child, but relief is not given in cases of non-execution (*Holmes* v. *Coghill*, 7 *Ves.* 499.), unless where the power is such as a court of equity considers as partaking so much of the nature and qualities of a trust, that it becomes the duty of the party to whom it is given to execute it; in which case, should the donee die before he has discharged that duty, the court will supply the non-execution of the power (*Brown* v. *Higgs*, 8 *Ves.* 570), the general observation of the author must therefore be confined to cases of the latter description.

(*a*) The words may be introduced, but they are not indispensible. If they are omitted, the donee may execute the power partially, and at different times, so that on the whole he does not exceed the limits of his power. *Digge's case*, 1 *Rep.* 173. *Bovey* v. *Smith*, 1 *Vern.* 84.

(*b*) Estates limited in default of appointment are vested, subject only to be divested by the exercise of the power.

So if it be intended that *A. B.* should revoke his appointment, and re-appoint, power should be expressly given him, *from time to time, either wholly or partially, to revoke such appointment, and limit new uses.*(a)

In the *execution* of a power it is mostly proper *to recite it,* and always to make it *apparent on the face of the instrument that it is the appointor's intention to execute and act under the*

Doe v. *Martin*, 4 *Term. Rep.* 39. *Osbrey* v. *Bury*, 1 *Ball & Beat.* 53. Hence the words used by the author, or the words 'in default of appointment, and in the mean time subject thereto, and so far as the same shall not extend,' or simply, 'and in default of appointment,' are equally valid with the longer forms used by some conveyancers.

(a) The donee may exercise his power by an absolute appointment, or he may reserve a power of revocation, notwithstanding the power does not comprise the words of the text, or any equivalent to them (*Adams* v. *Adams*, *Cowp.* 651.); but where the power is executed by deed, unless the donee reserve to himself a power of revocation, the power cannot afterwards be changed or altered, even though the original power may have given him the right of appointing and revoking from time to time. *Worral* v. *Jacob*, 3 *Meriv.* 256. Where the power is executed by will, though it operates not properly as a will, but as an appointment of use, yet as it partakes so much of the nature of a will as to be ambulatory, revocable, and incomplete till the death of the donee, it is not necessary to reserve a power of revocation to enable the donee to alter his disposition of the estate. *Oke* v. *Heath*, 1 *Ves.* 139.

power; and, therefore, reference should be made to the premises by description, &c. And it is best to say expressly, that *under and by virtue of such power, so given, &c. and in execution of it, the said A. B. doth appoint, &c.* (*a*)

Too great care cannot possibly be taken in the execution, to comply with and follow the requisite ceremonies: as if it be given to *C. D.* to appoint, with the approbation of her husband, testified by his being party to and executing the deed in the presence of three witnesses, &c. *the approbation of the husband, his being a party, his executing the deed in the presence of three witnesses,* &c. must be scrupulously complied with, and may be even stated.

And as the *excess* only, in the execution of an appointment, will be bad, (*b*) and a deficient

(*a*) The caution of the Author should be carefully attended to in practice, as by such means all question on the intention of the donee is obviated. But it is not absolutely necessary that the instrument should recite the power or even refer to it; for if the donee does an act with all the solemnities required and which can have no effect but by virtue of the power, it is taken to be done in execution of the power, *Dillon* v. *Grace*, 2 *Sch. & Lef.* 456. He must however do such an act as shews he has in view the subject of his power. *Lewis* v. *Llewellyn*, 1 *Turn.* 104. *Jones* v. *Curry*, 1 *Swanst.* 66.

(*b*) Thus, where a partial interest is given to an object of

execution cannot be extended, it is prudent *to be very full in the execution,* as the surplusage shall not, at least in equity, vitiate what would otherwise be good.

If power of revocation and re-appointment be given, and the appointor execute, he may reserve in such appointment a *new power of revocation, with power also to appoint new uses;* for without this express reservation of future revocation and new appointment, the first may often be absolute

2 *Burr.* 1148. *Preced Chanc.* 474. *Touchst.* 521. & *Booth's Opin.* ibid. & 1 *Coll. Jurid.* 421.

Powers *appendant* may be *destroyed* by lease and release, bargain and sale, feoffment, fine, or recovery; those *in gross* by the three latter species of conveyance, or they may be released.

Butl. n. (1.) to *Co. Lit.* 271 b. s. iv. & n. (1.) to 342 b. [1 *P. Wms.* 777. 3 *Bing.* 31.]

the power, with remainder to a person not an object, that part only is void which the power does not authorise, *Adams* v. *Adams*, *Cowp.* 651. *Brudenell* v. *Elwes*, 7 *Ves.* 382. But in the case of a power to appoint among children executed by will to a child for life with remainder to a grandson in tail, though strictly speaking the appointment to the grandson is an excessive execution of the power, the Court will, in order to give effect to the intention of the testator, construe the limitation *cy-près*, as devising an estate tail to the child. *Pitt* v. *Jackson*, 2 *Bro. C.C.* 51. *Brudenell* v. *Elwes*, 7 *Ves.* 382. On the other hand, in *Routledge* v. *Dorvil*, 2 *Ves. Jun.* 357., it was held, that where a donee appoints to several uses, some of which are too remote, as trenching on the rule against perpetuities, the appointment is not good as to those which are within the rule, but wholly void.

Powers *collateral* cannot be destroyed by the act of the person to whom they are given.

2 Ves. 78. *Co Litt* 299 b. n (1) 1 *Fearne*, 99, &c 2 *Burr* 879.

And note, as the appointor is merely an instrument, the appointee shall be in by the original deed (*a*)

(*a*) It merely remains to add, that the question stated *ante*, p. 86., as being left undecided, has late received the opinion of the Court. A conveyance was made to *A.*, his heirs and assigns, to such uses as *B.* should appoint, and in default of appointment to *B.* in fee: it was held that *B.*'s appointment deprived *his* wife of dower. *Ray* v. *Pung*, 5 *Madd.* 310. 5 *Barn. & Ald.* 561. But it is apprehended, that if the conveyance had been to *B.* in fee, to such uses as *B.* should appoint, and in default of appointment to *B.* in fee, the power would have merged in the seisin, and *B.*'s wife have become entitled to dower. A devise to one in fee to such uses as he shall appoint, will not deprive the devisee's wife of dower. *Goodhill* v. *Brigham*, 1 *Bos. & P.* 192. The ordinary mode of conveying an estate to a purchaser to uses to bar dower is, it is conceived, free from objection. The conveyance should be to him to such uses as he shall appoint, and in default of appointment, to him for life, &c. He being the releasee, the covenants are properly entered into with him, and on his appointment the benefit of them will be carried over to his appointee; and to render the concurrence of the trustee in future conveyances unnecessary, it may be contended that he is a volunteer, and therefore that his estate is void as against a subsequent purchaser for value.

CHAPTER XXII.

OF RENTS.

A RENT (*Reditus*) is, properly, a sum of money or other thing, to be rendered periodically, in consequence of an express reservation in a grant or demise of lands or tenements, the reversion of which is in the grantor or person demising. (*a*) 2 *Bl. Comm.* 41. *Gilb. on Rents.*

(*a*) A Rent must be a *profit*, but it may be either in money or money's worth, and either by payment, render, or corporeal service. But being a compensation or equivalent it must not be part of the thing itself, although it may be of its future produce: it must also be certain or capable of being reduced to a certainty by either party. Rent (unlike interest which accrues *de die in diem*), becomes payable only on the accomplishment of the full period at which it is made payable. If therefore a tenant for life, or the owner of any other limited estate, grants a lease, reserving rent payable half-yearly, and dies in the interval between the rent days, at common law the lessee was bound to pay rent only up to the last rent day, and none from that time up to the determination of the lease. But now by the statute 11 Geo. 2. c. 19. s. 15., the personal representatives of tenants for life are entitled to an action on the case for a proportionate part of the rent accruing in their ancestor's lifetime. This act has been extended by con-

2 *Bl. Comm.* 40. *Co. Litt.* 47 a. Parker *v.* Harris. 4 *Mod.* 79. *Cro. Jac.* 500. *Cro. Eliz.* 380. 565. 4 *Leon.* 217.

A rent, therefore, necessarily supposes a reception of such lands or tenements from another, to whom they primarily belonged and in whom the ultimate property continued vested: hence it follows, that, if lands or tenements were *not* derived from another, as anciently when lands were held in *allodio*, or if no other person has

Paget v. Gee, *Ambl.* 198. Vernon v. Vernon, 2 *Bro. C. C.* 659. 8 *Ves.* 308. struction to the executors of tenants in tail dying without issue, in the case of leases being made by them, which are not binding on the remainder-man or reversioner. And it is presumed that the executors of a husband seised in right of his wife, are also entitled within the act in the case of a lease granted by him alone, so as not to operate under the enabling statutes, *et vide* 1 *Swan.* 337. 354.

Co. Litt. 201. 202 a. note. *Co. Litt.* 302. 1 *Anders.* 253. 1 *Saund.* 287. *Prec. Ch.* 555. *Salk.* 578. Rent is due and payable upon the land from whence it issues if no particular place be mentioned in the reservation, and it is strictly demandable and payable before the time of sun-set on the day whereon it is reserved though perhaps not absolutely due till midnight, and therefore, if the lessee die before sun-set on the day whereon rent is demandable the rent unpaid goes to his heir, but if after sun-set and before mid-1 *P. Wms.* 178. night, it is said that it shall go to his executor and not to his next of kin.

Co. Litt. 142.(*a*) The tenements out of which a rent is to issue must be of a corporeal nature, in order that the person so entitled to the rent may have a remedy by distress. The rent must also be reserved to one of the grantors and not to a stranger to the deed. To rents in gross, the remedy by distress originally appertained by express reservation only, and hence arose the distinctive appellations of charge and seck to rents of this de-[Rodham v. Barry, K. B. April, 1826.] scription, as they were accompanied or not with such express remedy, but now, by the statute 4 Geo. 2. c. 28., all rents are alike attended by that remedy.

such ultimate property in him, there can be no rent.

If a person, consequently, grant over *his whole property* in certain premises to another, the other, (or grantee) paying to such person and his heirs a certain sum annually for ever, such annual sum will *not be properly a rent,* as the grantor has no ultimate property or reversion in him. Such annual payment is, indeed, commonly denominated a *rent*-charge or *rent*-seck; but it is not strictly and in reality a *rent;* and the law, accordingly, respected it differently; as it gave the grantor no power of distress without a special stipulation. (*a*)

(*a*) This method of conferring property was probably first devised as a convenient means of providing for younger children without interrupting the descent of the feud upon the eldest son; and also of carving out interests in land without the necessity of obtaining the consent of the lord, as was necessary in the case of a transfer of the land itself; for by this means no stranger was introduced into the feud, nor any relative obligation created between him and the lord. But as interests of this kind were an anomaly in the feudal system they were viewed unfavourably, and distress was not allowed unless it was expressly reserved: if, however, such a rent were granted for equality of exchange or partition, or in lieu of dower, it was not regarded in this obnoxious light, but was termed a rent-charge of common right, to which the remedy by distress was incident without any express provision. *Gilb. Rents*, 17. And it has lately been decided, that a distress may be taken for arrears of a rent-charge created by *will*, although the testator does not in terms give a power to dis- *Gilb. Rents*, 17.

Again, if a person grant an annual sum to be issuing out of his lands to another and his heirs for ever, without parting with any property in the lands themselves, it will be no *rent*, as it is no *return*, no *compensation*, since the grantee has no lands in consequence of such grant for which to *render* or *return* a *compensation* (*a*)

train—that power being a consequence drawn by law from the rent-charge. *Rodham* v. *Berry*, *K. B.*, *April*, 1826.

In the present day rent-charges are principally used as a security for life annuities; between which and a mortgage there is this difference:—a mortgage constitutes a *debt*, a life annuity is an *absolute purchase*—the consideration of the one is to be returned; the consideration of the other is gone for ever: and although a life annuity may be made repurchaseable, the money paid for redemption is not paid in discharge of a lien on the estate, but as the consideration for a new purchase. The principle to be collected from the cases on this head is, that since the proviso for repurchase is solely for the advantage of the *grantor*, by allowing him to extinguish the annuity at pleasure, without enabling the grantee to *compel* redemption, the grant is to be considered as strictly legal, and in no way subject to the rules which govern equities of redemption. *See Lawley* v. *Hooper*, 3 *Atk*. 278. *Murray* v. *Harding*, 2 *W. Black*. 859. *Irnham* v. *Child*, 1 *Bro. Ch. Ca*. 92. *Corn. U.* 42. 1 *Pow. Mortg* 139 *n. 5th ed.*

(*a*) If a rent-charge be reserved to the grantor on a conveyance in fee, the grantor is said to hold the rent by *re-grant* from the grantee. If so, the rent should be subject to the charges and incumbrances of the grantee; a point which has not yet received its due share of consideration.—As to the apportion-

As, however, the sum stipulated to be paid is an annual, or at least, a periodical sum, and to be issuing out of lands, it was, by reason of its analogy to the proper rent, denominated a *rent*-charge, or a *rent*-seck, according as the power of distress was or was not given.

Again, as a proper rent is a compensation or return for the enjoyment of a particular estate, it follows that when the particular estate determines the rent must also cease.

As the returns of the feud were conditions, on the breach of which the feud reverted to the lord, so the non-payment of rent occasioned a forfeiture of the lands out of which it was to issue.

The rigour of the feudal law with respect to forfeiture, in the cases of non-payment of rent, was soon, however, abated. It was thought unreasonably severe to insist on an absolute forfeiture of the premises on non-payment of rent at the very day on which it was reserved; and the law of distresses was, therefore, adopted from the civil code. But, as the distress was merely a substitute for the feudal forfeiture, it follows that it could only take place where *that* was al-

ment of rents, see the late case of *Smith ex parte*, 1 *Swan*. 337. and the learned reporter's note there.

lowed. If a person had no right of reverter, therefore, as in the cases where the lands out of which the annual payment was to issue had not moved from him, or where he had parted with his ultimate property in the lands which had originally moved from him, there could be no forfeiture to him of the lands or tenements; and consequently he could not be entitled to a distress which was merely substituted for the former remedy. If the particular estate for which the rent was to be rendered had expired, there could possibly be no forfeiture; as the estate which only could have been the subject of forfeiture had ceased to exist; and, consequently, there could be no distress.

In the two former cases, indeed, a power of distress might have been expressly created, but then it was, as the terms import, a private stipulation between the particular parties, and not a remedy given by the law. The law, however, has been altered in this respect, by statute 4 *Geo.* 2. *c.* 28; and in the case of the expiration of the term by the statute 8 *Anne*, *c.* 14.

If the lessor be seised *in fee simple*, the proper rent should be reserved *to him*, "*his heirs and assigns*;" if he have only a *chattel interest*, *to him*, "*his executors, administrators, and assigns.*" Though the best way of reserving such rent is to reserve it *generally*, without

8 *Co.* 71 a. 1 *Vent.* 118. 161. *Gilb. Rents*, 64, &c.

expressing to whom; as "yielding and paying therefore, yearly, during the said term, the sum of, &c." as the law will give it to the person who shall be, from time to time, entitled to the immediate reversion, which the rent will always follow; for as the rent is only a compensation for the lands, it shall go to him who would have been entitled to the lands in case the compensation failed.(*a*)

(*a*) If two joint-tenants lease lands by parol or deed poll, reserving rent to one of them, it shall nevertheless enure to both. If the lease be by indenture, the other will be estopped from taking a share; and if he to whom the rent is reserved die in the lifetime of his companion, the rent will cease, but the lease will continue; and if one joint-tenant make a lease for years reserving rent, and die in the lifetime of his companion, the survivor shall not have the rent. *Co. Litt.* 47. *1 Inst.* 185. *Yelv.* 159.

Reservation of rent by two tenants in common will operate in severalty, not indeed to make two rents of the full amount, but each shall take his proportion.

If two coparceners make a lease, reserving a rent, they shall have the rent in common annexed to their reversionary estate in parcenary; but if afterwards they grant the reversion, excepting the rent, they shall from henceforth be joint-tenants of the rent. A rent in gross being collateral to lands cannot be devested; nor will the simple nonuser of the right to receive it interfere with the continuance of the owner's presumptive possession. A fine or recovery levied or suffered of the land will not therefore affect the interests of persons in the rent; but although a rent-charge cannot be devested, non-payment of rent for any considerable period will be a ground for presuming that it has been released. *Wingate's Max.* 19. *Finch*, 9. *3 Cru. Dig.* 70.

Though the statute, 4 *Geo.* 2., has given the same power of distress in cases of rents-seck as in those of rent-charge, it is still usual to insert a special power of distress in the grants of rent; and such special power is generally accompanied also with a clause of entry on non-payment, with power to enjoy till the arrears be satisfied.

Sand 332. See 1 *Cru.* 62.

Rents charge or seck may be created by *fine, recovery, bargain and sale, lease and release, covenant to stand seised,* or *grant;* and may be limited to one in tail, with remainders over.

Sand. 163. *Bull.* n. (*l*) to *Co Litt.* 298 a.

They may also be *released to the person seised of the lands;* or *conveyed to a stranger* by *grant,* and that even to commence *in futuro,* or *under the statute of uses;* as a person may be seised of a rent to an use, which use will be immediately executed by the statute.(*a*) So a *fine* or *recovery* may be of a rent.(*b*)

Pig. 97. 1 *Cru* 120. 248. 2 *ibid.* 215

(*a*) If, therefore, lands are conveyed to *A.* and his heirs, to the use, intent, and purpose, that *B.*, or that *B.* and his heirs may receive a rent, the use is executed by the statute. So, where lands are conveyed to *A.* and his heirs, to the use, intent, and purpose, that *B.* and his heirs may receive a rent, with a declaration that *B.* and his heirs shall stand seised of the rent, to the use of *C.* for life, with remainders over; the rent is executed in *B.*,—*C.* and the remainder-men taking mere trusts. If the estate be conveyed to *A.* and his heirs, to the use that *B.* may receive a rent for life, and after his death, to the use that his first and other sons, successively,

If a rent be limited to *A. B.* in tail, *with remainder over in fee, A.* by suffering a recovery, may bar his issue and the remainder over, and gain *a clear and absolute fee in it:* but if a rent be granted *de novo* to *A.* in tail, *without a remainder over,* and *A.* suffer a recovery, he shall only acquire *a base fee determinable on failure of his issue.*(a) Pig. 97. Butl. n. (2) to Co. Litt. 298 a.

and the heirs of their respective bodies, may receive the rent; it may be contended that these are distinct rents, and that the rent to the second son is too remote, as being a new rent limited to take effect after an indefinite failure of the issue of the first son. Objections may also be taken to recoveries suffered by the father and son, on the ground that the tenant to the *præcipe* (being made by the father), has not an estate of freehold in that rent which is the subject of the son's entail. The way, therefore, to limit the rent, is, to grant a rent to a stranger and his heirs, in trust that he re-grant it to the intended uses. *Co. Litt.* 271 b. (1).

(b) If the rent be created by deed, or even as it should seem by parol, it cannot be released without deed, either at law or in equity. If a rent-charge be granted by a tenant for life and the remainder-man in fee, a release to either enures for the benefit of the other; but a release to one tenant in common does not operate for the benefit of his companion. See Cupit v. Jackson, 1 M'Cleland, 495. 1 Inst. 267 b.

(a) If there be several successive estates tail in a rent in remainder, the grantee in tail may, by suffering a recovery, acquire a fee commensurate with the duration of his own estate tail and the estates tail in remainder, that is to say, until all the individuals to take under them be extinct. And the reason of this difference between the effect of a recovery of a rent and a recovery of land is, that the rent being

charged upon the land for a certain period only, the grantee cannot by any means extend the duration of the charge so as to make it a rent in fee, although, by the exercise of rights incidental to particular interests, he may acquire the absolute dominion over it for the term originally granted.

PRINCIPLES

OF

CONVEYANCING, &c.

BOOK II.

OF CONVEYANCES, AS THEY RELATE TO ESTATES.

CHAPTER I.

OF A FEOFFMENT.

A FEOFFMENT is a conveyance which operates by *transmutation of possession*: it is essential to its completion that the *seisin* be passed. (*a*) Hence it can only be adopted in

See 1 *Burr* 92. 107. and *Cowp.* 691 701, &c. 2 *Bl. Comm.* 310. *Touch.* 203. *Butl. n.* (1) to *Co. Litt* 271 b. *Sand. Uses*, 268.

(*a*) In *Rees dem. Chamberlain* v. *Lloyd*, *Wightw.* 123, a feoffment was tendered in evidence upon which no memorandum of livery of seisin was endorsed. The feoffment had been made for twenty-five years, and possession had gone along with it. On the one side it was contended that livery of seisin ought not to be presumed under *thirty* years, the

cases where the seisin may be, and is actually to be, conveyed; as in the transfer of estates of *freehold in possession*. In the transfer of *chattel interests* there is no seisin to be conveyed, as the seisin remains in the freeholder: hence a term of years cannot be conveyed by feoffment. In the transfer of *reversious* or *remainders* on a freehold, the actual or corporal seisin is not concerned, as it continues in the particular tenants: Hence they cannot pass by feoffment, but by *grant*. So of *equitable interests*, &c.

Of Livery See *Walk.* N. xxix. to *Gilb. Ten.*

Hence, too, feoffments can only be made by a person *in the actual seisin* to a person who is *not in the actual seisin*: and, therefore, *one joint-tenant cannot enfeoff his companion*, because *his companion* has the seisin already; each joint-tenant being seised *per mie et per tout*. But, as *tenants in common*, and *coparceners* as to some purposes, have several freeholds, they *may* enfeoff their companions of their respective shares.

Gilb. Ten. 72.

period at which it becomes unnecessary to prove deeds; on the other side it was urged that livery ought to be presumed after the expiration of *twenty* years, as possession for that length of time would bar a possessory action. The Court of Exchequer thought twenty years the best analogy, but did not give any decided opinion on the point, as the necessity of livery was superseded by its being recited in the deed that the feoffee was in possession, which it was held estopped the feoffor from saying otherwise.

But a feoffment by a person having no right of property in the lands will pass them; because the moment he enters to give seisin he gains the fee simple in possession by wrong, See 1 *Burr.* 92.

This mode of conveyance is, in many instances, the most advisable, as it clears all disseisins, &c. and turns all other estates into rights, so that a fine, levied by the feoffor to the feoffee, or by the feoffee to a stranger, will bar them, if not avoided within the time prescribed by the statute. (*a*)

Touch. 203.

See 2 *Bl. Com.* 357. 1 *Salk* 340. & N (b). 2 *Lev.* 52.

(*a*) But to give a fine this effect one of the parties must have the freehold—whether by disseisin or lawful title is not material. If a termor wishes to acquire the fee he should assign the term to a trustee in trust for himself personally. Having then no legal interest in the land he may enter and make a feoffment, on which a fine may be levied, and the use thereof declared to himself in fee. The effect of the feoffment is, to turn the estate and seisin of the trustee and reversioner into rights of entry; but the reversioner may enter within five years from the last proclamation on the fine to revest his seisin, and if he does so the term in the trustee will be revested also and the trustee will then stand possessed of it in trust for the original termor, whose wrongful fee will now be destroyed; if the reversioner does not enter he will be barred by nonclaim on the fine if he be under no disability, and the *quondam* termor will have acquired an indefeasible estate in fee, and he may then take an assignment of the term to attend the inheritance. If the first assignment of the term alludes to the intended feoffment the assignee will be a party to the disseisin, and the term will, it is apprehended, be forfeited, and the reversion accelerated into an estate in possession. This subject has lately occupied the

The giving of livery, indeed, is often attended with inconvenience and expence when the feoffor resides at a distance from the lands; but this may be easily prevented by executing a power of attorney; and we may remember that [aggregate] corporations must always make attornies, under their common seal, to deliver [and receive] seisin.

A feoffment, therefore, is incompatible with any conveyance operating by way of use. (*a*)

attention of the Courts, and the above is submitted to be the result of the decisions; which are the following:—*Taylor* v. *Horde*, 1 *Burr.* 60. 2 *Cowp.* 689. *Jerrit* v. *Weare*, 3 *Price*, 575. 3 *Pres. Abs. Pref.* ix. *Doe* v. *Moody*, 1 *Sand. U.* 40. 2 *Pres. Conv. Pref.* xxxii. *Doe* v. *Synes*, 3 *Barn. & Cress.* 388. *Reynolds* v. *Jones*, 2 *Sim. & Stu.* 206.

(*a*) The difference between conveyances at common law and conveyances which derive their effect from the statute of uses is thus stated by Mr. Butler:—A feoffment, fine, and recovery, are conveyances at the common law, so far as they convey the land to the feoffee, conusee, or recoveror; if they are directed to operate to, or to the use of the feoffee, conusee, or recoveror, they have no other operation than as conveyances at the common law: but if they are directed to operate to the use of any other person, then, though they are conveyances at common law so far as they convey the land to the feoffee, conusee, or recoveror, they derive their effect under the statute of uses so far as the use is limited by them to the person or persons in whose favour it is declared. A lease and release has a mixed operation; the lease has the operation of a bargain and sale, and is in effect a bargain and sale

A feoffment and bargain and sale cannot be made by the same person, of the same lands, at the same time; for the feoffment conveys the seisin or possession to the feoffee, while it is absolutely essential to the efficacy of a bargain and sale that it remain in the bargainor. Now the possession cannot be in, and not in, the feoffor at the same time. If the feoffment take effect, the possession *must be out of him* by the very act of livery; and if the possession *be out of him,* he cannot be seised to the use of the bargainee.

under the statute: but the fee passes to the lessee and enlarges his estate to an estate of inheritance by the operation of the release at the common law; and, if the release is directed to operate to, or to the use of the releasee, he is said to be in by the common law; but if the use be declared in favour of another person, the statute then again intervenes, and executes the use in the person or persons in whose favour it is declared. A bargain and sale enrolled, and a covenant to stand seised, wholly derive their effect from the statute of uses; the first is considered a real contract, by which the bargainor, for a pecuniary consideration, sells and contracts to convey the lands to the bargainee: the second is a real covenant, by which a person covenants to stand seised to the use of his or her husband, wife, child, or near relation.—Neither of those conveyances has any effect at the common law, or independently of the statute of uses, in conveying the land from the party selling or covenanting to stand seised, to those in whose favour they are intended to operate; so that at common law, they have no legal operation, and are merely declarations of trust, binding the land in equity. But the statute attaches on them, and devests the land from the party selling or covenanting to stand seised, and vests it in the person to whom it is limited. *Butl. Fearne,* 416. *7th edit.*

A bargain and sale is a contract to convey, and not an absolute conveyance as a feoffment. A person cannot contract to sell what he has actually parted with. If he convey the possession to another he can have none in himself to supply the use.

2 *Bl. Comm.* 300 *Gilb. Ten.* 133. & *Walk.* n. LIV.

A clause of *warranty* is usually added to a feoffment; but it is preferable to insert a covenant by the feoffor, "for himself, his heirs, executors, and administrators," as the warranty only binds the *heirs*. Yet it may be sometimes prudent to insert a clause of warranty in addition to the covenant, as it may possibly bind a reversioner or remainder-man when no assets descend, and be even a bar to a latent entail

Ante B. 1. C. 8.

CHAPTER II.

OF A GRANT.

A GRANT is appropriated to the conveyance of things *not in possession*, as reversions and remainders, and other incorporeal hereditaments, as rents advowsons, &c. of which no livery can, of course, be given. (*a*) Hence the law divided estates into those which lay in *livery* and those *in grant*. *2 Bl. Com. 317. Touchst. 228. Butl. n (1.) to Co. Litt. 384 a. Sand. Uses, 327.*

As livery of seisin was a matter of notoriety, it was essential to the transfer of whatever that livery could be made. It was, indeed, of itself, sufficient to effectuate such transfer; and no farther evidence of the conveyance was required than the evidence of such livery. But, as livery could not be made of incorporeal he-

(*a*) But the common practice is, to take all conveyances of freehold property by lease and release. If however, the existence of a reversion can be clearly proved, the expence of the lease for a year may be saved. It is curious to observe a doctrine so well settled giving way to an inconsistent practice.

reditaments, interests, or rights, the law, even before the statute of frauds, required the transfer of them to be in writing under seal. In many cases also, it ordained that *attornment* should be made; as in the conveyance of a reversion or a seigniory, and that for the following reasons:—

Gilb Ten. 81.

1st, That the tenant in possession might not be subjected to a stranger or a new lord, without his own approbation and consent.

2dly, That he might know to whom he was to render his services and distinguish the lawful distress from the tortious taking of his cattle.

3dly, That by such attornment the grantee of the reversion or seignory might be put into the possession of it, and that others might be apprized and informed of the transfer.

Stat 4 *Anne*, c. 16. s 9, 10;—& 11 *Geo* 2. c 19. s 11

The reasons, however, for attornment having in a great measure ceased, from the change of manners, and the decline of feudal principles, attornment is now rendered unnecessary to the completion of a grant (*a*).

(*a*) The reason however for attornment, so far as it proceeded on notice to the tenant, is still applicable to the case of a mortgage, where the mortgage is made *subsequently* to the lease; for a mortgagee will not be entitled to the rent

The operative word in this species of conveyance is "grant." (*a*)

under a lease made *prior* to the mortgage, until he shall have given notice to the tenant of the mortgage, and required payment of the rent to himself. Otherwise than this, actual attornment is seldom heard of in practice, except to a receiver; or in the case of a recovery in ejectment, where the tenants frequently attorn to the lessor of a plaintiff, in order to save the expences of sheriffs' poundage and officers' fees on executing a writ of possession, 2 *Bing.* 59.

A feoffment by a tenant in tail, who is actually seised by force of the intail, creates a discontinuance of the estate tail, by transferring to the feoffee not only the possession, but also the right of possession, so as to take away the entry of the issue in tail, as also of the persons in remainder and reversion, and to drive them to their real action. But a grant cannot in any case create a discontinuance, for every discontinuance works a wrong; whereas a grant only transfers what the grantor may lawfully give. Thus Lord Coke says, if tenant in tail of a rent service, or of a remainder or reversion in tail, *grants* the same in fee, and dies; this is no discontinuance to the issue in tail. 1 *Inst.* 322 a. 327 b. It follows from this principle that a grant can in no instance create a forfeiture for it is an innocent assurance, and conveys no more than the grantor may lawfully pass. "If a tenant for life, or years, of an advowson, rent, common, or of a remainder or reversion of land grants the same in fee, this is no forfeiture, because nothing passes but that which lawfully may pass." 1 *Inst.* 251 b.

(*a*) For the construction of a grant see the last note in the Chapter on Covenants, to stand seised.

CHAP. III.

OF A GIFT.

2 *Bl. Com.* 316. *Touchst.* 227.

A GIFT is, properly, a *voluntary conveyance;* that is, a conveyance *not founded on the consideration of money or blood.*

See 13 *Vin.* 519. Fraud. 22 *Vin.* 15. Voluntary Convey.

The operative word in it is "*given.*" It is, at this day, a suspicious species of conveyance, as being without what the law denominates either a good or valuable consideration. It is void as to those who were creditors of the donor at the time of its being made, though valid as to subsequent creditors. If it be of an estate of freehold in possession, it requires livery to perfect it: For, as it has no consideration either of blood or money, no use arises on it; and, consequently, livery is still necessary. (*a*)

(*a*) A conveyance in consideration of 5*s*. or 10*s*. is deemed a voluntary conveyance, for want of adequate consideration; and in such a conveyance a use may be raised. Without a deed of conveyance no estate in freehold property can pass; receipt of rent or acquisition of the possession is not enough. To the transfer of personal property, however, a deed of conveyance is not necessary, as whether there be or be not a written assignment, there must be actual delivery of the thing

Originally, feoffments were considered as gifts. The term Gift now, however, is ge- 2 *Bl. Com.* 310. *Wright's Ten.* 150.

to the assignee. A parol gift without delivery is void. 2 *Stra.* 955.

A voluntary conveyance, or a conveyance founded on a nominal consideration, is void, as against a subsequent purchaser of the estate from the settlor for valuable consideration, whether such purchaser have notice of the previous voluntary conveyance or not. *Cowp.* 278. 2 *Lev.* 105. 9 *East*, 59 2 *Taunt.* 69. 77. 18 *Ves.* 100. But a person who has made a voluntary settlement cannot, it should seem, maintain a bill in equity for specific performance of an agreement which is to defeat that settlement; the party *himself* has no right to disturb it; as against *himself* it is valid and binding; when he seeks to get rid of it, the Court will not impede him, but it will not assist him. *Smith* v. *Garland*, 2 *Meriv.* 123. A voluntary conveyance of real estate, or a chattel interest, in favour of a child, by one not indebted at the time, though he afterwards becomes indebted, will be good against future creditors, though not against future purchasers, (*Russell* v. *Hammond*, 1 *Atk.* 15, 16. *Holloway* v. *Millard*, 1 *Madd. Rep.* 414. *Battersbee* v. *Farrington*, 1 *Swanst.* 106)—provided there be no particular evidence or badge of fraud; a power of revocation for instance, (*Peacock* v. *Monk*, 1 *Ves.* 132.)—or retention of possession, (*Bates* v. *Greaves*, 2 *Ves. Jun.* 293.); and see *Stileman* v. *Ashdown*, 2 *Atk.* 481., and *Lord Banbury's case*, 2 *Freem.* 8.

As to marriage settlements: if a settlement be made after marriage, it will, as a general rule, be fraudulent and void against all persons who were creditors of the husband at the time of the settlement, (*Middlecomb* v. *Marlow*, 2 *Atk.* 520. *White* v. *Sanson*, 3 *Ibid.* 413. *Watts* v. *Thomas*, 2 *P. Wms.* 364.; and *Kidney* v. *Coussmaker*, 12 *Ves.* 155.)—unless such settlement contain a provision for debts, (*George* v. *Milbanke*, 9 *Ves.* 190.); or is made in pursuance

nerally appropriated to the creation of an *estate tail:* hence the person creating an estate tail is

of articles before marriage, (*Beaumont* v. *Thorpe*, 1 *Ves.* 127.); or unless it be against a single debt, (*Lush* v. *Wilkinson*, 5 *Ves.* 387.); or the debt be secured by mortgage, in which case it would not affect the settlement (*Stephens* v. *Olive*, 2 *Bro. C. C.* 90.); for to do that it seems the party must have been insolvent at the time. (*Lush* v. *Wilkinson*, *ubi supra;* and see *East India Company* v. *Clavel*, *Gilb. Eq. Ca.* 37.). But it is observable, that if (with the exceptions alluded to) there are creditors at the time of such settlement, and the settlement is on that account declared fraudulent, the property so settled will become part of the husband's assets, and all *subsequent* creditors will be let in to partake of it. (*Taylor* v. *Jones*, 2 *Atk.* 600.) By the 73d sect. of the late Bankrupt Act (6 *Geo.* 4. *c.* 16.), voluntary conveyances by any bankrupt, being insolvent at the time, are declared absolutely void.

A voluntary deed never parted with, and executed for a purpose that has never been completed, is considered in equity as an imperfect instrument, (*Cecil* v. *Butcher*, 2 *Jac. & Walk.* 573.); and if a power of revocation be introduced in a deed which purports to be a voluntary settlement, it will then it is conceived become a testamentary writing, if the settlor, taking an estate for life under the settlement, retains possession of the deed, (3 *Price*, 368. 379.); and, therefore, if the estate be directed to be sold after the testator's death, and the money divided between certain persons, they will be considered as legatees, and must pay the legacy duty. In *Attorney-General* v. *Jones*, 3 *Price*, 368., the settlor made a voluntary assignment of leasehold and personal property to trustees, for the use of himself for life, and of several persons therein named at his death, with a power of revocation reserved to himself; he never having parted with the deed, or with any part of the property during his life, and confirming

denominated the *donor,* and the person taking it the *donee;* hence the issue of a tenant in tail is said to take *per formam doni,* and the writ given him to recover his estate is called the *formedon* *F. N. B.* 211, 212.

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it in most respects by his will; the deed and will were considered to be in the nature of testamentary instruments, and the property passing under them was held to pass as legacies and to be subject to the legacy duty. 3 *Price*, 368.

A conveyance for payment of debts generally, to which no creditor is a party, nor any particular debt expressed in the deed, is good as against the grantor and his heirs; but void as against a purchaser. *Leech* v. *Leech,* 1 *Ch. Ca.* 249. But to enable a purchaser to set aside a deed made for payment of debts, he must, it is conceived, be a purchaser for valuable consideration, and have no notice of the deed of trust. See *Langton* v. *Tracey,* 2 *Ch. Rep.* 16. *S. C. Nels.* 126. A conveyance to pay debts may be, 1st, a conveyance of all the debtor's property in trust to pay all his debts; 2d, a conveyance of part of his property in trust for his creditors generally; 3d, a conveyance of all or part of his property in trust for a few or a portion only of his creditors; and, 4th, a conveyance of part of his property in trust to pay a particular set of scheduled creditors. The whole of these conveyances are voluntary and void, excepting so far as *all* the creditors combine to make them good. *Lewis* v. *Jones,* 4 *Barn. & Cress.* 506. *Holmes* v. *Love,* 3 *Barn. & Cress.* 242. *Spottiswood* v. *Stockdale,* *Coop.* 105. *Rickstock* v. *Lyster,* 4 *Maul & Selw.* 371.

CHAPTER IV.

OF A LEASE.

2 Bl. Comm. 317. Touchst. Ch 15. Bacon on Leases, and ante, b. 1. c. 2.

A LEASE is the grant of the possession of lands or other things, to a person for *life*, *years*, or *at will*.

On a lease for life, as it goes to the seisin as well as to the possession, livery must be made, as on a feoffment; unless it be created by way of use. A lease for *life*, therefore, is a *freehold* interest, and must be passed by livery, &c. as any other estate of freehold. But a lease for *years* passing only the right of *possession* as contradistinguished from the *seisin*, is completed by *the entry of the lessee;* for even *before* the entry, an *interest* passes to him (called his *interesse termini*) which the lessor cannot rescind. *Before entry*, however, the lessee cannot bring an action of trespass; nor is he, till entry, if he take at common law, and not by way of use, capable of receiving a *release of the reversion*.(*a*)

Litt. S. 459. Co. Litt. 270.

(*a*) If he take by way of use, actual entry is not requisite; e *cestui que use* for years has a complete *estate*, as dis-

A lease for a chattel interest is still good by parol, so it exceed not three years from the making; but, if it be for a longer term, or for an estate of freehold, it must be by deed or note in writing, signed according to the statute of frauds.(*a*) 29 *Car.* 2. c. 3.

tinguished from an *interesse termini*, immediately on the execution of the conveyance, as is exemplified in the common assurance by lease and release; the lease for a year by way of bargain and sale raises a use, which is immediately executed into an estate in possession by the statute; if this were not the case, entry would be necessary on a lease and release, which would be as inconvenient as livery of seisin on a feoffment.

In 1799, *T. W.* made a lease to *J. W.* of certain premises for a term of sixty years, *to commence* in 1809; in the year 1800, *T. W.* died, having devised the same premises to *J. W.* for life; in 1806, *J. W.*, by lease and release, conveyed away the legal estate of his life interest in the premises to a trustee in trust for him. *J. W.*, therefore, had the legal estate for his own life from the testator's death in 1800, until 1806, when the legal estate was conveyed to his trustee; and it became a question, whether the term of sixty years was merged in the life estate, in other words, whether the term to commence *in futuro*, in 1809, merged in the existing life estate. It was holden in the Court of K. B., that the reversionary term was not merged, for that being only an *interesse termini*, it did not acquire the character of an *estate* till after the legal interest for life had passed out of the devisee; the two estates were not in him at the same time; there was therefore no merger. *Doe* v. *Walker*, 5 *Barn. & Cress.* 111.

(*a*) This position is more correctly stated, *ante*, p. 41. If it be attempted to make a lease by parol for more than three

A lease is usually and properly in consideration of a yearly rent; and the best way of reserving such rent is to reserve it generally, as "yielding and paying, therefore, yearly, during the said term, the sum, &c." as the rent shall follow the reversion.

See *ante*, b. 1. c. 22. (of Rents.)

A *covenant* should be inserted for payment of the rent; as the lease, if once assigned, might be assigned to a succession of beggars.(*a*)

See 1 *Burr.* 125. 2 *Stra.* 1221. Lekeux *v.* Nash.

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years, and the lessee enters and pays rent, although the lease be void even for the three years, yet the lessee will be tenant from year to year, *ante*, p. 5.

(*a*) This leads to the distinction between privity of estate and privity of contract. Immediately on the execution of the lease a privity arises between the lessor and lessee, which (provided there are any collateral covenants in the lease not implied by law) is called a *privity of contract*, and on that privity, the lessee is bound to perform all those collateral covenants, although he should never perfect the lease by entry. When he enters, there arises between him and the lessor a second privity, called the *privity of estate*, and this renders him liable for the covenants implied by law. In all leases there are certain *implied* covenants. On the part of the *lessor* is implied a covenant, that his lessee shall quietly enjoy the lands demised during the term, against all persons lawfully claiming title: if the lease be for life, against all men; if only for years, against all persons having title, either paramount to, or through the lessor. But against the acts of strangers, the law raises no undertaking upon a lease for years; and therefore, if the lessee be ousted by one who has no title, the law leaves him to his remedy against the wrong-doer. *Com. L. & T.* 158. On the part of the *tenant*, the law implies a covenant to pay the rent—to cultivate the land.

There should be also inserted *a provision for re-entry*, on nonpayment of rent, to guard against 1 *Burr.* 125.

in a husbandmanlike manner—and to keep the premises in repair. These covenants are obligatory upon the lessee so long as he continues to hold the premises without obstruction on the part of the lessor, or such persons as the lessor may have covenanted against. 1 *Roll. Abr.* 519. *Webb* v. *Russell*, 3 *T. R.* 402. *Iggulden* v. *May*, 9 *Ves.* 330. Besides these implied covenants, the parties usually enter into certain express covenants, the object of which is either to enlarge or abridge the implied covenants, or to provide for the performance or omission of some act connected with the thing demised, not provided for by law. Thus the lessor's covenant for quiet enjoyment, is usually qualified to a quiet enjoyment as against himself and all persons claiming under him; and the lessee's covenant to pay rent is often narrowed to a payment of rent while the premises are inhabitable, and his covenant to repair exempted from reparation rendered necessary by fire, wind, and tempest. Hence the division of covenants into such as are *express* and such as are *implied*. The introduction of an express covenant narrowing or enlarging an implied one, is in a great measure an abrogation of the implied covenant, and the express covenant then becomes the only one on which the parties can sue.

All *implied* covenants run with the land, and so do many *express* ones; but the distinction between express covenants which run with the land, and such as do not run with the land, but are *collateral thereto*, and affect only the person of the lessee, is very abstruse. An expression of the rule was attempted in *Spencer's case*, (5 *Co.* 16 a.,) with indifferent success. But whatever may be the exact criterion between collateral covenants and covenants running with the land, it has been decided, that a covenant for quiet enjoyment (*Noke* v. *Aroder*, *Cro. Eliz.* 436. *S. C. Moore*, 419. *Campbell* v. *Lewis*, 3 *B. & A.* 392.); for further assurance (*Middle-*

the event of the lands being uncultivated or without sufficient distress; for though the sta-

more v. *Goodale, Cro. Car.* 503.); for renewal (*Spencer's case. Roe dem Bamford* v. *Hayley*, 12 *East.* 464); to repair the demised premises (*Doe dem Dean and Chapter of Windsor's case*, 5 *Rep.* 24. *S. C. Hyde* v. *Dean of Windsor, Cro. Eliz.* [457] 552. *Dyer*, 13 b. *Marg. Barnard* v. *Godscall, Cro. Jac.* 309. *Conan* v. *Kemise, Sir W. Jones*, 245. *S. C. Congham* v. *King, Cro. Car.* 221. *Tilney* v. *Norris, Lord Raym.* 553. *Potter* v. *Swetnam, Style*, 406., and *Smith* v. *Arnold*, 3 *Salk.* 4); to pay rent (*Parker* v. *Webb, Salk.* 5.); to discharge the lessor of charges ordinary and extraordinary (*Dean and Chapter of Windsor's case*, 5 *Rep.* 25.); to permit the lessor to have free passage to two rooms excepted in the demise (*Cole's case*, 1 *Salk.* 196. *S. C. Bush* v. *Calis*, 1 *Show.* 389. 12 *Mod.* 24. *Carth.* 232.); to cultivate the lands in a particular manner (*Cockson* v. *Cock, Cro. Jac.* 125.); to reside upon the premises (*Mayor of Congleton* v. *Pattison*, 10 *East.* 136); not to carry on particular trades (*Tatem* v. *Chaplin*, 2 *H. Bla.* 133.); these have all been held to be covenants running with the land; and it is a settled rule, that covenants running with the land, bind not only the covenantor during his lifetime (and his representatives after his death in respect of his assets) by *privity of contract*, but also every person who takes the legal estate for the residue of the term by *assignment*, such person being affected by *privity of estate*.

As between the *lessor and lessee*, *they* are reciprocally bound to each other for the covenants *in law* by privity of estate, and for the covenants *in deed* by privity of *contract*. The *privity of estate* exists no longer than the relation of landlord and tenant, and therefore if the lessee parts with his estate to a stranger with the concurrence of his lessor, the privity of estate is destroyed, and his liability thereupon ceases.

tute of the 2 *Geo.* II. *c.* 19. *s.* 16. gives a remedy in the latter case, yet it would be advisable

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Walker's case, 3 *Rep.* 24 b. *March* v. *Bruce*, 2 *Bulstr.* 151. *S. C. Cro. Jac.* 334. *Brett* v. *Cumberland*, *Cro. Jac.* 523. *Anon.* 1 *Sid.* 447. *Thursby* v. *Plant*, 1 *Saund.* 240. *n.* (5). *Ashurst* v. *Mingay*, 2 *Show.* 134. But it is not competent to him to put an end to the privity of estate without his landlord's assent; and therefore in order to discharge the lessee, it is necessary that the lessor should testify his assent to the assignment, either expressly or impliedly, as by receiving rent from the assignee, or recognizing the assignee as his tenant by some other act. *Wadham* v. *Martin*, 8 *East.* 316 n. *Auriol* v. *Mills*, 4 *T. R.* 98.

It is otherwise in respect of the lessee's liability upon the privity of *contract.* For when he has entered into an express agreement, he is so completely bound thereby that no assignment either of part or of the whole estate can exonerate him, even though the lessor assent to an assignment and receive rent from the assignee. *Rushden's Case*, *Dyer*, 4 b. *Broom* v. *Hore*, *Cro. Eliz.* 633. *Matures* v. *Westwood*, *ib.* 617. *Ards* v. *Watkin*, *ib.* 637. *Barnard* v. *Godscall*, *Cro. Jac.* 309. *Brett* v. *Cumberland*, *ib.* 522. *Bachelour* v. *Gage*, *Cro. Car.* 188. *Norton* v. *Acklane*, *ib.* 580. *Ashurst* v. *Mingay*, 2 *Show.* 134. *Parker* v. *Webb*, 3 *Salk.* 5. *Wadham* v. *Marlow*, 8 *East*, 314. n. *Buckland* v. *Hall*, 8 *Ves.* 95. *Staines* v. *Morris*, 1 *Ves. & Bea.* 11. As the lessee's assignment *by his own act* will not release him from his express covenants, so neither will an assignment by act of law. *Hornby* v. *Houlditch*, *Andr.* 40. *S. C.* cited 1 *T. R.* 92. So, if the lease be taken from him under an execution, he still remains liable upon his express covenants. *Auriol* v. *Mills*, 4 *T. R.* 99. And an insolvent debtor is liable upon his express covenants for a breach subsequent to his discharge, provided no particular release be given by the act. *Cotterell* v. *Hook*, *Dougl.* 97. *Aylett* v. *James*, cited 1 *H.*

to empower the lessor to enter without being obliged to pursue the directions of that act.

Bl. 441. As to bankruptcy, it is now settled by the late bankrupt act, that if the assignees accept the lease or agreement, the bankrupt shall *not* be liable to pay any rent accruing since the date of the commission, or to be sued in respect of any of the conditions, covenants or agreements therein; nor if they decline, shall he be liable, if he deliver the lease up to the lessor or person agreeing to grant it, within fourteen days after notice that the assignees will not take it; and if the assignees do not (upon being thereto required) elect whether they will or will not accept the lease, the lessor or person so agreeing or any one entitled under him, may petition the Lord Chancellor to compel them. *6 Geo.* 4. *cap.* 16. *s.* 75. See also *Copeland* v. *Stephens*, 1 *B. & A.* 593.

As between the *lessor* and *assignee*, the lessor immediately upon the assignment, acquires a right against the assignee by reason of the privity of estate, and may enforce against him all the covenants in law and in deed which run with the land; *Webb* v. *Russell*, 3 *T. R.* 393; provided the assignee accepts or assents to the assignment: and the law will presume that he assents to the deed, unless he does some act to shew his dissent; but it is not necessary that such dissent be by deed or record, *any writing* will suffice for the purpose. 3 *B. & A.* 39. If the assignee will not take the lease, the original lessee remains liable, if the assignee accepts the lease, the lessor may at one and the same time, sue the lessee upon his express covenant, and the assignee in respect of the privity of estate; but then he will be permitted to take out execution against one only. *Brett* v. *Cumberland*, *Cro. Jac.* 523. The assignee being liable upon the covenants merely in respect of the privity of estate, and no privity of contract existing between him and the original lessor, it follows that his liability can last only so long as he remains possessed of the estate. As soon as he assigns *the whole* of it over, the privity is destroyed, and his liability ended, though the assignment be made without

A lease may be *assigned*; that is, the *whole interest of the lessee* may be conveyed to another; 2 Bl. Comm. 326, 7. Dougl. 187. n. (*) 59.

notice to the lessor. *Pitcher* v. *Tovey*, 1 *Show.* 340. *S. C.* 4 *Mod.* 71. 1 *Salk.* 81. 2 *Vent.* 234. 3 *Lev.* 295. *Carth.* 177. *Holt.* 78. 12 *Mod.* 23. *Boulton* v. *Canon*, 1 *Freem.* 336. *City of London* v. *Richmond*, 2 *Vern.* 421. *Buckland* v. *Hall*, 8 *Ves.* 95. *Staines* v. *Morris*, 1 *Ves.* & *Bea.* 11. Nor will an assignment to a mere pauper be deemed fraudulent;—the lessor still retaining his right of action against the original lessee upon the privity of contract. *Valliant* v. *Dodomede*, 2 *Atk.* 546. *Huddle* v. *Hawksley*, cited *ibid.* *Taylor* v. *Shum*, 1 *Bos.* & *Pul.* 21. So an assignment to a *feme covert* will discharge the assignee. *Burnfather* v. *Jordan*, *Dougl.* 452. "For a *feme covert* is of a capacity to purchase of others without the consent of her husband, and though he may disagree and divest the estate, yet if he neither agree nor disagree the purchase is good." *Co. Litt.* 3 a. And it is now settled that a mortgagee of the *whole term* stands in the same situation as any other assignee, and as such is liable to the covenants in the mortgagor's lease, *even though he never enter upon the premises.* *Williams* v. *Bosanquet*, 1 *Brod.* & *Bing.* 238. 246.

With respect to an assignee of part of leasehold premises, it has very recently been adjudged that he is not liable to the covenants in the original lease except as to the part which is assigned to him. The lessor may indeed sue such an assignee in the first instance, in respect of the whole rent. But the assignee may by his plea, shew that his liability is confined to the particular part. And if, as to that part, he is a joint-tenant with others, who are not joined in the action, he cannot avail himself of that non-joinder, except by plea in abatement. *Merceron* v. *Dowson*, *King's Bench*, *May*, 1826.

Between the *lessor* and an *under-tenant* there is neither privity of estate nor privity of contract; so that these par-

Palmer v. Edwards, 1 *Str.* 405. Poultney v. Holmes, *Dr. & Stud. Dial.* 1. c. 8. 2 *Stra.* 1221.

or the lessee may *underlet,* that is, convey for a *less term* than he himself has in the lands. If,

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ties cannot take advantage the one against the other of the covenants either in law or in deed, which exist between the original lessor and lessee. The lessor therefore cannot sue the under-tenant upon the lessee's covenant to pay rent—to repair—to cultivate, &c. though the under-lessee be in the actual possession of the premises, nor can the under-lessee sue the original lessor for breach of his covenant for quiet enjoyment, though the disturbance be committed by the lessor himself. *Holford* v. *Hatch,* 1 *Dougl.* 183.

In conclusion, it may be observed, that in the case of an *assignment,* the covenants at law, being inherent in the estate, pass along with it from the assignor to the assignee. Express covenants running with the land, stand upon nearly the same footing as covenants in law, and may always be taken advantage of by the assignee, who on the other hand will be bound by such covenants whenever they affect the present state of the land, even though he be not named; but if they respect something to have a future existence upon or in respect of the land, they will run with the land and be binding on the assignee provided only he be named Mere collateral covenants never run with the land, and are binding only between the covenanting parties and those persons who upon the death of the parties become possessed of assets, and remain answerable in respect of such assets. Moreover, an under-lessee is not liable to any *action of covenant* by the original lessor, whether he be in or out of possession of the premises, or whether the covenant be expressed or implied, or whether it be collateral or *currente humo.* It is, however to be remarked (as hinted in the next paragraph in the Text) that by the statute 4 *Geo.* 2. *c.* 28, the original landlord has a right of distress on the land which no assignment or under-lease can avoid: and in most leases an express proviso is inserted that if the rent be un-

therefore, it is intended that he shall not do so, an express provision or covenant should be inserted to restrain him. And a covenant that the lessee shall not assign without the consent of the lessor, has been deemed a common and usual one. (*a*)

Lekeux v. Nash. 3 *Anstr.* 700. Folkingham v. Croft.

paid for a given time, or the covenants be unperformed, it shall be lawful for the lessor to enter and re-possess himself of the land, and thenceforth for ever thereafter to hold and enjoy the same as of his former estate and condition. Neither can this proviso be avoided by any act of the lessee. As between the lessor and the land, the implied covenants are binding in every event, but the express covenants depend on the solvency of the lessee.

(*a*) In *Crusoe* v. *Bugby*, 2 *Wm. Black.* 766. 3 *Wils.* 234., a covenant "not to assign transfer or set over, or otherwise do or put away with this present indenture of demise," was held not to extend to an under-lease of part of the term, the words, "otherwise do or put away" being construed to signify an entire disposal of the premises. But where the words were, "not to assign or set over, or otherwise depart with this indenture of lease," it was considered in practice, that an under-lease from year to year was a departure with the lessee's interest in the indenture for a time 'otherwise than by an assignment or setting over for the whole term.' An agreement for a lease is sometimes resorted to as an evasion of this covenant: but it is to be remembered that the lessor cannot distrain on a tenant who enters into possession under such an *agreement*, for in such case there is no demise, either express or implied. In the language of the Court of Common Pleas,—when a person is so foolish as to enter upon the premises under an *agreement* for a lease, without a stipulation that in case no lease is executed, he shall hold for one year

2 *Bro. C.C.* 636. Tritton *v.* Foot, 3 *Ves. Jun.* 295. 6 *Ves.* 232.

Again, a lessor is not obliged to renew the lease (unless by custom); and, therefore, if it be intended that the lessor shall be compelled to do so, a covenant for that purpose should be also inserted. But if the lessor covenant to renew under "*the like covenants,*" it will not extend *to a further covenant for renewal.* (*a*)

certain, until the lease be granted the landlord may turn him out without notice: but the effect is, that the lessor cannot distrain for the rent, he must bring his action. *Hegar* v. *Johnson*, 2 *Taunt.* 248. Ante p. 20. 1 *Stark.* 308. In a late case it was held at *Nisi Prius*, that a deposit of a lease by way of mortgage is no breach of a covenant, "not to let, set, or assign, transfer, set over, *or otherwise part with* the premises thereby demised, or *that present indenture of lease* or his or their term or *interest* by that indenture granted, or any part thereof, without the special licence, consent, and approbation of the lessor." *Doe* d. *Pitt* v. *Laming*, 1 *Ry. & Moo.* 36. And on application at the Comptroller's office for the City of London, the Editor was informed, that a mortgage is not an assignment within the condition not to assign usually inserted in city leases, but he felt great difficulty in relying on that answer as a good defence in an action at law, whatever relief it may have afforded in a Court of equity. He therefore advised a licence to be obtained as the only sure course of preventing doubt. The latter paragraph in the text has been distinctly overruled in *Church* v. *Brown*, 15 *Ves.* 258. where it was held, that under an agreement for a lease the lessor is not, without express stipulation, entitled to a covenant restraining alienation without licence, as a proper and usual covenant; *et vide* 2 *Swan.* 247.

(*a*) A *covenant* on the part of the landlord for continued

A lessee for years is compellable to repair, &c. and, therefore, if it be not intended that he Co. Litt. 53 a.

renewals, as it tends to create a perpetuity, is not favoured by any Court. A promise by the landlord to renew a lease in consequence of money already laid out by the tenant, was held by Lord Chancellor Thurlow to be *nudum pactum*, and not to be specifically performed in equity; and his Lordship further held, that the circumstance of the tenant's having subsequently laid out money, as it was voluntary, could not alter the case, though had the tenant stated his intention, and the promise to renew had been founded on *that*, he would have been entitled to a specific performance. *Robertson* v. *St. John*, 2 *Bro. Ch. Ca.* 140; and see *Richardson* v. *Sydenham*, 2 *Vern.* 447. But where such a covenant is express and unequivocal, it will be duly enforced. *Bridges* v. *Hitchcock*, 1 *Bro. P. C.* 522. *Furnival* v. *Crewe*, 3 *Atk.* 83. In one case the Court of King's Bench went so far as to hold, that the circumstance of the lessor's having frequently renewed a lease, gave a construction to an equivocal covenant for a perpetual renewal, and bound him continually to renew. *Cook.* v. *Booth*, *Cowp.* 819. But this decision has been generally condemned, and may now be considered as exploded. See *Baynham* v. *Guy's Hospital*, 3 *Ves.* 295. *Moore* v. *Foley*, 5 *Ves.* 232. In a late case where a lease for twenty-one years contained a covenant by the lessor at the expiration of eighteen years to grant a new lease, "with all covenants grants, and articles contained in the original lease;" the Court of King's Bench held, that this covenant was satisfied by the tender of a new lease containing all the former covenants *except the covenant for future renewal*. And the judgment was affirmed in the Court of Exchequer Chamber upon writ of error. *Iggulden* v. *May*, 7 *East.* 237. 2 *New. Rep.* 448. 9 *Ves.* 325. *Inchiquin* v. *Burnel*, *Harg. Jur. Arg.* In the case of leases renewable upon lives, it has frequently been determined, that such right of renewal will be

should do so, a covenant from the lessor to repair should be inserted.

The operative words in a lease are "*demise, lease, and to farm lett.*"

2 *Bl. Com.* 319, &c. *Touchst.* 280, &c. *Bac. on Leases, C.*

See *ante*, Book I. Ch. 2. Of Terms for Years; and as to leases by husband and wife of the wife's lands, ecclesiastical persons, corporations, guardians, &c. the books cited in the margin.

lost, if the lessee neglects to renew upon a life dropping. *Baynham* v. *Guys Hospital*, 3 *Ves.* 295. *Eaton* v. *Lyon*, 3 *Ves.* 690. *Bailey* v. *The Corporation of Leominster*, 3 *Bro. C. C.* 539. *Willan* v. *Willan*, 16 *Ves.* 84. *The City of London* v. *Mitford*, 14 *Ves.* 41. *Maxwell* v. *Ward*, 11 *Price*, 3. 1 *M'Lel*, 458. A covenant for renewal is a covenant running with the land. *Isteed* v. *Stoneley*, 1 *And.* 82. *Roe* v. *Hayley*, 12 *East.* 469. And it is observable, that a person having a partial interest in the lease, as a tenant for a less term of years, or a tenant for life, can compel contribution to a renewal fine. *Charlton* v. *Driver*, 2 *Brod. & Bing.* 345. *Capel* v. *Wood*, *MSS. Vice-Chanc. Feb.* 21, 1825.

CHAPTER V.

OF AN EXCHANGE.

AN EXCHANGE is a *mutual* grant of *equal interests*, the one in consideration of the other.(*a*) No delivery was necessary on an exchange at common law; but entry by each party was absolutely necessary to effectuate it. 2 *Bl. Com.* 323. *Touchst.* c. 16. *Co Litt.* 50 b. *Perk.* s. 285.

If both parties die before entry, the exchange will be void; and if one die, his heir may

(*a*) As fee simple for fee simple; estate for life for estate for life; estate tail for estate tail; freehold for freehold; legal estate for legal estate; copyhold for copyhold of the same manor. If the legal estate be in a trustee, the exchange must be made by and to him. So if there are joint-tenants for life with the inheritance of the fee to one, the exchange must be to them accordingly. But exchanges under inclosure acts are generally considered as not bound by these rules. Thus lands of freehold tenure may be exchanged for lands of copyhold tenure within the same parish or manor—a tenant for life may exchange with a tenant in fee, provided the remainder-man be not thereby injured, (2 *Chit. Rep.* 251.); an equitable tenant with a tenant

avoid it. (*a*) Hence it may be sometimes preferable to make the parties (except as to corporate bodies, or others who cannot stand seised to an use,) execute reciprocal conveyances founded on the statute of uses, as those of lease and release; which will do away the necessity of entry.

Butl. n. (1.) to *Co. Litt.* 271 b. s. 3.

An exchange can only be between *two parties,* though the *number of persons* is immate-

3 *Wils.* 483. *Hargr.* (1) to *Co. Litt.* 50 b.

of the legal estate, and a copyhold tenant with his own lord. But these allotments and alterations of the *possession* of the lands within a parish or manor can scarcely be called exchanges, they are mere substitutions of one piece of land for another, without effecting any change or alteration of the title or interest. The lands taken in exchange by each person will be of the same tenure as the lands given by him in exchange, and be held by the same services, &c.; and a clause is now usually inserted in all inclosure acts, communicating the title of the lands given in exchange to those taken in exchange.

(*a*) The exchange is not merely voidable but absolutely void according to Lord Coke, who speaking of exchanges says, "the parties have no freehold in deed or law in them before they execute the same by entry, and therefore if one of them dieth before the exchange be executed by entry, the exchange is *void;* for the heir cannot enter and take it as a purchaser, because he was named only to take by way of limitation of estate in course of descent." *Co. Litt.* 50 b.

If an infant exchange lands, and after his full age occupy the lands taken in exchange, the exchange is become perfect; for at the first the exchange was not *void* but voidable only; for it amounted to a livery, and was also a benefit or recompence. *Co. Litt.* 51 a.

rial. (*a*) The word "*exchange*" is the only operative word, and therefore indispensible, and it implies a *mutual warranty*. (*b*)

(*a*) That is to say, several persons may compose each party. Thus *A.* cannot grant lands to *B.* in exchange for lands which *A.* is to receive from *C.*; but a tenant for life, tenant in tail, and reversioner on the one part, may exchange with a trustee of the legal estate, and a feme covert and tenant in fee of the equitable interest, on the other part. *Co. Litt.* 50 b. 51 a. 2 *Shep. Touch.* 297, 298. *Pres. ed.* *Bustard* v. *Coulter*, *Cro. Eliz.* 902. *Eton Provost* v. *Winton Bp.*, 3 *Wils.* 496. The foundation of an exchange at common law, is a mutuality of interest, and an implied warrantry, which engenders a right of re-entry in case of eviction. Neither of these principles are applicable to exchanges under inclosure acts, where the object is convenience of occupation, and contiguity of possession merely. Hence it will probably be decided, if the question should ever come before the courts, that the commissioners may, by their award, make an exchange as between three persons for the convenience of each. *Cov. Inc.* 53.

(*b*) Now by the statue of frauds (22 *Car.* 2. *c.* 3), a writing is in all cases necessary, if the exchange be of freehold interests, or of a term exceeding three years. *Litt. sect.* 62. *Co. Litt.* 50 a. It is submitted that a statutable use cannot arise on the seisin acquired by an exchange. The exchange is perfect in itself, and gives the legal estate. Besides there can be no consideration moving from the *cestui que use* who must necessarily be a third party, and consequently open to the observations of the last note. Exchanges are now usually made by mutual releases, the one in consideration of the other, but the title of the land given in exchange is involved in investigating the title to the lands taken in exchange. A late promising and worthy Editor of Noy's Maxims, was however of a different opinion, but he cites no authority for his position. See *Byth. Noy*, p. 156.

CHAP. VI.

OF A RELEASE.

2 *Bl. Com.* 324. *Gilb. Ten.* 53. *Touchst.* c. 19. p. 320. *Litt. Ch.* 8. s. 444, &c.

A RELEASE is the relinquishment of a right or interest in lands or tenements to another who has an estate *in possession* in the same lands or tenements. (*a*)

There are five species of release: 1st, *by way of enlargement;* as if he in remainder in fee release to the particular tenant in possession. 2dly, *By way of passing an estate;* as when one coparcener or joint-tenant releases to the other. 3rdly, *By way of passing a right;* as when a disseissee releases to the disseissor. (*b*) 4thly,

(*a*) Actual possession however is not at all times necessary: a *vested estate* is in many cases sufficient for the operation of a release. Thus if a man make a lease for years, remainder for years, and the first lessee enter, a release to the termor in remainder by the reversioner is good to enlarge his estate into a fee simple. *Co. Litt.* 270 a. n. (3).

(*b*) As to the distinction between releases of *estates* and releases of *rights*, it is observable, that the release of an *estate* occurs where there is a privity between the releasing parties. A release of a *right* occurs where no such privity exists, as in

By way of extinguishment; as if my tenant for life makes a greater estate than he is warranted

the case of discontinuance, disseisin, abatement, &c.; the disseisee may release his right to the disseisor, and then no estate passes but only a bare right. *Co. Litt.* 266 a. 275 a. If *A.* seised in fee in right of his wife, makes a lease for forty years to *D.*, and afterwards *A.* dies leaving his wife surviving, and she releases to *D.* generally, this is the release of an *estate*, and operates by way of enlargement of *D.*'s estate from a chattel to a freehold. But if *A.*, being so seised, makes a lease *for life* to *D.* (which is a discontinuance of the wife's estate), and after *A.*'s death his widow releases to *D.* generally, this is the release not of *an estate* but of a *right*, and operates by way of confirmation of *D.*'s lease for life, and also of the reversion which the discontinuance created and which is now descended on the heir of *A.* In the first case, the lease was not *void* but *voidable* only: it divested not the wife's estate, but on the contrary, till avoided, bound it; and it is a maxim, 'that the estate which I may defeat by my entry, I may equally make good by my confirmation.' *Co. Litt.* 300 a: therefore the wife, on the death of her husband, may confirm the estate of the lessee by release, which thus far operates as a release of right, but being made generally, it operates *to enlarge the estate* of the lessee from a chattel to a freehold interest, and in that respect it is a release of estate. In the latter example, the husband having leased to *D.* for life, he thereby divested and discontinued the wife's estate, and turned it into a mere *right*. By the discontinuance he also created a new reversion in fee in himself, which on his death descended to his heir at law; and the wife could not avoid these estates by her entry at the common law, but only under the statute 32 *Hen.* 8. *c.* 33., and see *Co. Litt.* 297 b. 326 a. 333 b. *Ritso.* 190. Her release therefore, in the latter instance, was a release of that right simply.

There is also another distinction between the release of

in granting, and I release to his grantee; or if the lord release to his tenant his seigniorial rights. And 5thly, *By way of entry and feoffment;* as when a disseissee releases to one of two disseissors.

But, in order to give operation to a release, it is necessary that the releasee have the seisin, or at least possession, of the premises, either by livery, by the statute of uses, or by actual entry;

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an estate and the releases of a right, which it is material to observe here. The release of an estate admits of *qualification* at the will of the releasor; thus the lord may release his seignory to the tenant of the land, in fee, in tail, for life or years. But the lease of a right admits no such qualification: if released but for a moment, it is extinguished for ever. *Co. Litt.* 274 a. 280 a.

It is further observable that a release of a right to him who has a reversion or a remainder is a release to him who has the freehold: so a release made to a tenant for life, or a tenant in tail shall enure to him in the reversion or remainder, if they plead it: and so to trespassers and feoffees, but not to disseissors. *Litt.* s. 522. And as a release cannot be for a part of the interest of the releasor, nor for a partial period of time, so neither can it be on a condition. *Noy*, 75. From this doctrine it follows, that to a release of a right, words of inheritance are not requisite, but to a release of estate, the releasee having no previous inheritance and fiefs being only for life, or in fee, according as they were originally granted, the release gives the estate to the releasee only for his life, unless it be expressly made to him and his heirs. *Co. Litt.* 273 b. (2). A release of all demands extinguishes all actions, real and personal, and is the most ample release a person can make. *Noy. Max. Ch. Rel. Byth. ed.* 176.

and, therefore, if any convey by lease and release who cannot stand seised to an use, as a corporation, the lease on which the release is to be grounded must not be in the common way of bargain and sale, but by way of demise and lease at common law, *with actual entry by the lessee.*

Care must also be taken that the premises in the lease, or bargain and sale, be at least commensurate with those in the release, as the release is only of the right to, or estate in, the premises of which the releasee is in actual possession; and, consequently, no more can pass.

A release is the proper mode of extinguishing a right to, or an equity, or contingency, or possibility, in, the lands of the releasee.

The operative words in a *release* are, "*release*" or "*remise, release, and for ever quit claim and discharge.*"

CHAP. VII.

OF A CONFIRMATION.

2 *Bl. Com.* 325. *Gilb. Ten.* 75. *Touchst* 311. *Litt.* ch. 9. s. 515, &c. *Plowd.* 397.

A CONFIRMATION differs essentially from a release, as it only validates and establishes that estate or interest which the tenant *already has*; whereas a release is the relinquishment of a right which the tenant had not before. So far as the particular estate is *increased*, it is *not* a confirmation; it is not the *strengthening of the tenant's estate*, but the *giving him a greater one*." (*a*)

(*a*) Estates which are void cannot be confirmed; but those which are voidable only may. *Co. Litt.* 295 b. Thus a lease by a tenant for life is absolutely void at his death, and admits of no confirmation by those in remainder. *Doe* v. *Archer*, 1 *Bos. & Pul.* 531. As to the distinction between void and voidable estates, see 1 *Pow. Mortg.* 209, 210 a. 2 *Ibid.* 723 a.

In reference to the effect of a deed of confirmation it is laid down in *Braybroke* v. *Inskipp*, 8 *Ves.* 417., that where a person is called upon to join in a conveyance for the purpose of obviating a specific objection to the title, he will not be bound by it as to any interest of which he has not been apprized. But if he consents to join in the conveyance upon being told generally that there are objections to the title, he must be taken to have inquired into the nature of those objections, and cannot afterwards raise a question as to the extent of his in-

The operative words are, "*ratified and confirmed;*" though for safety, it is usual and prudent to insert the words, "*given and granted,*" also.

formation. This rule has received a practical illustration in the great case of *Cholmondeley* v. *Clinton*, where a deed of confirmation, dated 1794, was held not to confirm the title generally, but only as to the particular point for which it was applied for and obtained. 2 *Meriv.* 355. A confirmation to a tenant of the freehold or inheritance cannot be so worded as to have a less operation than that of confirming the whole estate, and therefore a confirmation to such a tenant, either of the lands or of his estate in them for any term or period, is a confirmation of the whole freehold or fee. A disseisor always acquires by the disseisin a tortious fee simple; a confirmation therefore to him, however qualified, is a confirmation of the whole fee. It is otherwise in the case of a *term of years*. A confirmation may be made of *part* of the term. The reason of the distinction is, that an estate of freehold or inheritance is considered as integral and indivisible; but as years are several, the term which is composed of them is necessary fractional and separable, and may consequently be confirmed in part by using proper expressions for the purpose. This confirmation, however, must be by apt words; for if a person confirms the *lease*, or *demise*, or *estate* of the tenant for years for part of the term, as the words 'lease,' 'demise,' or 'estate,' signify *all* the interest or term of years which the tenant has, the subsequent words are not considered as qualifications of the former words, but as absolutely repugnant to them; and as both cannot stand together, the law prefers the first, which are the principal, to the other, which are only secondary, and thereby the whole term will be confirmed. The confirmation should be 'of the *land* for *part* of the term,' if it be intended that it should have a partial operation merely. *Co. Litt.* 297 a. and n. (1.) 1 *East*, 502. *Skin.* 543.

CHAP. VII.

OF A SURRENDER.

2 *Bl. Com.* 326. *Touchst.* ch. 17. p. 300.

A SURRENDER is the yielding up, or returning, or relinquishing, of *a smaller estate,* to him who has a *greater estate* in the same lands in remainder or reversion *immediately expectant upon such smaller estate:* (*a*) for if there be an estate to *A.* for life, remainder to *B.* for life, remainder to *C.* in fee, *A.* cannot surrender to *C.* *by reason of B.'s mediate or intervening estate.* (*b*) If *A.* pass his estate to *C.* it will *not be*

(*a*) It differs from a release in that the smaller estate is conveyed to the greater, (and for this purpose every estate in remainder is considered greater than the particular estate in possession) whereas in a release the greater estate is conveyed to the less. In a surrender the less estate is merged, in a release it is extinguished. That a term for years in possession will merge in a term for years in remainder, has lately been distinctly acknowledged in *Stephens* v. *Bridges,* 6 *Madd.* 66; *et vide Tamlyn on Terms,* 200. *Cro. Eliz.* 302. 3 *Pres. Conv.* 193.

(*b*) Therefore, where an estate was limited to *A.* for life, remainder to *B.* for life, remainder to *C.,* the eldest son of *A.,* in fee; and *A.* in the lifetime of *B.,* in consideration of an annuity of 14*l.* to be paid by the said *C.* to him out of the

a surrender, any more than if made to a stranger who had nothing in the lands.

As a surrender is, generally, for the advantage of the surrenderee, the law will often presume his assent to it; but the particular tenant cannot enforce it upon him *nolens volens*, and so get rid of his obligations: and it is therefore prudent to make the surrenderee a party, and express his consent, that it may be apparent on the very face of the deed. (*a*)

premises, and for other considerations, did by deed, give, grant, surrender, and confirm unto the said *C.* and his heirs the said premises; it was held, that the deed could not operate as a *surrender* according to the intent of the parties, upon account of *B.*'s intermediate estate for life; but that there being a *consideration of blood* between the father and son, the conveyance should operate as a *covenant to stand seised. Doe dem. Woolley* v. *Pickard*, 1 *Saund.* 236. *e.* 4.

This principle will also illustrate the common limitation to trustees to preserve contingent remainders. It is now settled beyond doubt, that the estate of the trustees, being confined to the life of the preceding tenant for life, is a vested estate of freehold; and, therefore, that the tenant for life cannot surrender to the ulterior remainder-man on account of this interposed estate. *Dormer* v. *Fortescue*, 3 *Atk.* 123. 135; 4 *Bro. P. C.* 353. 505; *Co. Litt.* 337 b. (2.)

* (*a*) As there is necessarily a privity of estate between the surrenderor and surrenderee, no livery of seisin is necessary to perfect a surrender. 2 *Bl. Com.* 326. In short, no other act is requisite to perfect a surrender than the bare grant: the consent of the surrenderee to accept the surrender is presumed till the contrary be shewn. *Thompson* v. *Leach*, 2 *Salk.* 618.

A surrender might have been by parol; but now, by the statute of frauds, it must be by deed or note in writing, signed by the surrenderor, or his agent, lawfully authorised by writing, or by act or operation of law. (*a*)

(*a*) Upon this clause it was held by Lord C. B. Gilbert, in *Magennis* v. *M'Cullogh*, *Gilb. Eq. Ca.* 236., that a lease for years cannot be surrendered by simply cancelling the indenture, there must be a writing, signed by the party, but a *deed* is not absolutely necessary, the words of the statute being by *deed* OR *note in writing*. *Farmer* v. *Rogers*, 2 *Wils* 27. If the surrender were made by note in writing, there was no occasion for a stamp-duty before the last stamp act, but now by stat. 55 *Geo.* 3. *c.* 184. a stamp is required to be impressed on a surrender by whatever means it be accomplished.

Surrenders by implication remain as they did at common law, being expressly excepted out of the statute of frauds. Thus if a lessee for life accept from the lessor a lease in writing, though it be only for years, the estate for life will be a surrendered and merged in law, for the lessee by his acceptance of the second lease, admits that the lessor had power to grant it, which he could have unless the former lease were merged. *Davison* v. *Stanley*, 4 *Burr.* 2210. *Berkeley* v. *Archbishop of York*, 6 *East* 186. And it is equally a surrender, though the second lease be limited to commence at a future day, (*Ive's case*, 5 *Rep.* 11 b. *S. C. Cro. Eliz.* 522. *Mellow* v. *May*, *Moore*, 636); or upon condition to be void upon a contingency, which afterwards happens, so as to render the new lease void *ab initio*; *Fulmerston* v. *Steward*, *Plow.* 107 b.; and a surrender in law is sometimes of greater force than a surrender in deed; as where a lease for years is made to begin at Michaelmas next, this future interest cannot be expressly surrendered, because it is not an estate, and there is no reversion wherein it may drown, but by a surrender in law it may

The operative words in a surrender are, "*surrendered and yielded up*;" though they are usually preceded by the word *granted*. (*a*) *Sand. Uses*, 360.

be merged; as if the lessee before Michaelmas takes a new lease for years, either to begin presently or at Michaelmas, this acceptance of a second lease is a surrender in law of the former one. *Co. Litt.* 338 a. But if a lessee for years accept a new lease by indenture of *part* of the land previously leased, it is a surrendar only for that part, and not for the whole. 2 *Roll. Abr.* 498, (M.) *pl.* 1. *et vide* further as to surrender in law, the late case of *Doe* v. *Johnstone*, 1 *M'Lel. & Yo.* 141.

(*a*) *Et vide* further as to surrenders, *ante* p. 55.

CHAPTER IX.

OF AN ASSIGNMENT.

2 *Bl. Com.* 326. AN ASSIGNMENT is, properly, the transfer of one's whole interest in *any* estate; but it is now generally appropriated to the transfer of *chattels*, either real or personal, or of *equitable interests*. (*a*)

(*a*) If the assignment be of all the assignor's estate and interest, to hold from a day to come, there is an obvious repugnancy between the premises and *habendum*; the former conveying all the assignor's interest in the term, and the latter permitting the previous portion of it to remain in him. Hence it has been supposed that an assignment *in futuro* is void, and such perhaps is its effect at law, if the *premises* correspond with the *habendum*; but it is a rule that if the whole interest be conveyed by the premises, the *habendum* cannot limit a less estate. Thus if lands are conveyed to *J. S.* and his heirs, *habendum* to him for life; *J. S.* has an estate in fee by the premises, and the *habendum* is void. 8 *Co.* 56 b. 2 *Co.* 24 a. *Plowd.* 152, 153. 2 *Bac. Abr.* 494. So if there be an *express* estate limited to *A.* in fee by the premises, *habendum* after the death of the grantor to *A.* in tail; in this case the *habendum* is void, and *A.* shall take a present estate by the premises. *Carter* v. *Madgwick*, 3 *Lev.* 339; *et vide Lilley* v. *Whitney*,

An *assignment* of a term differs from an *under-lease*, in that the *former* is the parting with the *whole*, and the *latter* with *a portion only, of one's interest or estate.* (*a*) *Ante*, b. 2. c. 4.

The operative words are, "*assigned, transferred, and set over*;" though usually the word "granted" is inserted; and, in the assignment of *chattels*, the words "*bargained and sold*" also.

Dyer, 272 a. pl. 30. 2 *Roll. Ab.* 66. pl. 4. *Hob.* 171. *Moor.* 881. pl. 1236. Therefore, as every assignment must necessarily embrace the whole estate and interest of the assignor, it cannot in fact convey an interest *in futuro*, although it purport so to do on the face of it.

(*a*) And *that* the latter, not the former portion of the term. The statute of uses does not apply to chattel interests, so that the case cannot be helped by resulting use; and it is apprehended, that if the former portion of the term be clearly and unequivocally reserved to the assignor, the assignment is void, for as the term does not immediately pass out of the grantor, the assignment operates nothing, and is therefore nugatory.

CHAPTER X.

OF A DEFEASANCE.

2 Bl. Comm. 327. Touchst. ch. 22. p. 396.

A DEFEASANCE is a collateral deed, made at the same time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created may be defeated or totally undone.

A defeasance is now, however, seldom resorted to, as it is much preferable to make the conditions apparent in the deed, so that the deed shall be complete in itself. For, as the conveyance is absolute, should the defeasance, which is contained in a separate instrument, be lost, the proof of the condition might be difficult, and often impossible.

CHAPTER XI.

OF A COVENANT TO STAND SEISED.

A COVENANT to stand seised to the use of another must be *by deed;* for a covenant cannot be by *parol.* It must be by a person *seised* of lands or tenements; and, consequently, cannot embrace an equity, or right, or contingency, &c. though it may be of a *reversion,* or *vested remainder;* for the reversioner or remainder-man *is in the seisin.* It cannot be by a tenant in tail, except as to his own life.(*a*) It must be *in*

2 *Bl. Comm.* 338. *Touchst.* 511, 512. *Sand. Uses,* 556. See also *Com. Dig. Cov.* (G.) 2 *Lev.* 9.

(*a*) A *covenant to stand* seised is an innocent assurance; and it is a rule, that an estate granted by a tenant in tail to commence *after* his death by an innocent assurance is void; it follows, that if a tenant in tail covenant to stand seised to the use of himself for life, with remainder over, or to uses to commence after his decease, such covenant, estate, and remainder are void, because the title of the issue will commence before any seisin can arise under the uses or the remainders. *Doe* v. *Whittingham,* 4 *Taunt.* 20. But if a *tenant in fee* covenants to stand seised to the use of himself for life, with remainder to *J. S.*, to whom he is related, the covenant will be good for the sake of the remainder. *Per* Holt, C. J., in

consideration of marriage or blood; for a covenant to stand seised *to the use of a stranger* would be void. It must *not* be in consideration *of money;* for that would be a bargain and sale. But it is not necessary that the consideration of blood be expressed: for if a person covenant to stand seised, to the use of his *wife, son, or the like,* it will be sufficient; as the consideration would be apparent.(*a*) A person may covenant

Machell v. *Clarke,* 2 *Ld. Raym.* 778. *et vide* 1 *Pres. Abs.* 390. 406.

(*a*) It has long been *vexata questio,* whether this consideration may be averred in the teeth of a deed which professes to have been made in consideration of money only. If the motive inducing the deed be a sum of money *and* 'divers other good causes and considerations,' then the money consideration failing, the divers other considerations may fairly enough be entered into; but if the deed be made in consideration of money alone, it imports that no other consideration superinduced the conveyance. The language of Lord Hardwicke on this point is, "where any consideration is mentioned, as of love and affection only, if it is not said also, *and for other considerations,* you cannot enter into proof of any other; the reason is, because it would be contrary to the deed; for when the deed says, it is in consideration of such a particular thing, that imports the whole consideration, and is a negative to any other." *Peacock* v. *Monk,* 1 *Ves.* 127. The rule, however, is thus laid down in *Cromwell's case,* 2 *Co.* 76 a., "when a fine, feoffment, or other conveyance imports an express consideration, a man may aver by word another consideration, *which stands with the consideration expressed;* but the parties cannot by parol make any averment *against* the consideration expressed;" and this ex-

to stand seised to an use *in futuro*, as from Christmas next; or, if he be seised in fee-

pression of the rule seems to be preferable to that proposed by Lord Hardwicke, *Doe* v. *Sherlock*, 1 *Fox & Smith*, 78. But it is not sufficient to prove a *kindred* merely, it must also be proved that the deed was wholly or in part founded on the consideration of that kindred; the mere existence of the fact of kindred does not necessarily imply that the deed was founded upon it, especially where a valuable consideration is expressed, and no other consideration is referred to by the deed.

It is not exactly settled what degree of relationship is necessary to support a covenant to stand seised. The kindred between second cousins would perhaps be sufficient, if the fact were noticed in the instrument; but if the relationship be not mentioned in the covenant, then it is questionable, whether the tie could be considered so strong between second cousins, as to induce a valuable gift from the one to the other of them, without the accompaniment of friendship, acquaintance, or some such cause; and it is to be recollected, that friendship, acquaintance, &c. form neither good nor valuable considerations in the eye of the law; besides, it would be extremely difficult to presume, that a kindred comparatively so remote as that between second cousins was the consideration of the deed without some evidence of a wish on the part of the covenantor to keep the property in his family, or that he had no nearer relation, or the like. In *Goodtitle* v. *Pettoe*, the lessor of the plaintiff was the nephew of the covenantor, and the Court was of opinion that he had title to recover, because he was named in the deed; and though it was not stated that he was nephew to the covenantor, yet being expressly named, he might aver himself within the consideration. 2 *Stra.* 934. Mr. Sanders says (2 *U.* 81.), that if a man covenant to stand seised to the use of his wife, son, or *cousin*, without saying in consideration of the natural love he

simple, that his heirs shall stand seised after his decease.

bears towards them, the covenant will raise the use; citing *Bedell's case*, 7 *Co.* 40., which is an indifferent authority to this purpose, the relationship in that case being between a father and son, and the word *cousin* being evidently thrown in by the reporter; at all events it is but a *dictum*, and the books do not afford an instance of a covenant being brought before the Courts, supported merely by an averred relationship between *two cousins* of any degree.

If a man covenant to stand seised to the use of himself for life, with remainder to trustees for supporting contingent remainders, with remainder to his first and other sons in tail, if the trustees are not the covenantor's relations, no use will vest in them, but the remainders over will be good. This is said to be one reason why covenants to stand seised have fallen into disuse. 2 *Sand. U.* 83.

From this Chapter it will appear, that covenants to stand seised are always voluntary. And it is an invariable rule of the Court of Chancery, 'never to decree specific performance of a voluntary covenant, which is in equity as no covenant at all, and only a nominal one in law.' 2 *Eden.* 294. It has been expressly decided, that limitations in a marriage settlement to the brothers of the settlor, are not good against a subsequent purchaser for valuable consideration. *Johnson* v. *Legard*, 3 *Madd.* 283. Hence a covenant to surrender copyhold lands to the same uses as the covenantor has previously covenanted to stand seised of freehold lands, would be of no avail against a subsequent surrender for value; and a covenant to assign leaseholds in a similar manner would, it is conceived, be equally futile against a subsequent assignment for valuable consideration; and whether the purchaser has notice of the previous covenant or not, will not make any difference, as appears in the Chapter on Gifts, *ante*, p. 260, 1. As to the freeholds, the

The proper word is "covenant;" but other words may be tantamount; (*a*) as, if a person

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covenant is executed by the statute of uses; but as to the leasehold and copyhold, it is executory, and a surrender or assignment can only be enforced in a Court of equity where the consideration is such as that Court acts on.

It is merely necessary to add, that a power to appoint to any person generally, cannot be reserved in a covenant to stand seised, for between the appointee and the covenantor there may be no relationship whatever. If, however, the power be restricted to an appointment between the relations of the covenantor, it is generally considered that it will be good. *Goodtitle* v. *Pettoe*, *Fitzg.* 2 *Barn.* 10. 2 *Stra.* 934.

(*a*) "*Dedi et concessi* are general words, and may amount to a grant, feoffment, gift, release, confirmation, surrender, &c.; but a release, confirmation, or surrender, &c. cannot amount to a grant, &c., nor a surrender to a confirmation or release, for these are peculiar conveyances destined to a special end." *Co. Litt.* 400. It is an established rule, that a deed shall never be laid aside as void, if by any construction it can be made good. *Hob.* 277. *Earl of Clanricarde's case*. *Shep. Touch.* 82, 83. Therefore, where a man seised in fee of a rent, granted it by deed to one who was his kinsman, and there was an attornment to the grant, but it was made by a person who was not the real tenant of the land, and as such void; though the intent appeared that the deed should operate as a grant at common law with an attornment, yet since it could not pass that way, it was adjudged that the deed being made to a relation should operate as a covenant *to stand seised*. *Sanders* v. *Savile*, 3 *Lev.* 372. So where a man by deed gave and granted land to another, with a letter of attorney to make livery, but which was never made; yet as the grant was to a relation, it was held to operate as a *covenant to stand*

"*bargain and sell*" in consideration of *blood* or *marriage*, it will be good *as a covenant to stand seised.*

seised. Osman v. *Sheaf*, 3 *Lev.* 372. So a deed made by a man to *his daughter*, by way of *bargain and sale*, but which could not take effect as such for want of a money consideration, has been held to operate as a *covenant to stand seised. Crossing* v. *Scudamore*, 1 *Vent.* 137; an see *Baker* v. *Lade*, 3 *Lev.* 291. *S. C.* 4 *Mod.* 150. *Wats* v. *Dix*, *Sty.* 204. *Bedell's case*, 7 *Rep.* 40 b. 2 *Roll. Abr.* 786. (O) pl. 1. So a deed intended to be a *feoffment*, but which was void as such for want of *livery*, being made to a *relation* of the grantor, has been held to operate as a *covenant to stand seised. Tomlinson* v. *Dighton*, 1 *P. Wms.* 163. *Arg.* 2 *Wms. Saund.* 96 a. n. (1.) And it has been decided, that a deed with words of *release* may be either pleaded as a *grant*, or as a *covenant to stand seised* to uses. See *Roe* v. *Tranmer*, *Willes.* 682. and 2 *Wils.* 75. And the words *limit* and *appoint* in a deed may operate as words of *grant*, so as to pass a reversion. *Shove and others* v. *Pincke*, 5 *T. R.* 124. So an instrument in the form of a grant may operate as a surrender; and it was ruled by Lord Kenyon at the Stafford Assizes, that an instrument in the form of a surrender might operate as a covenant to stand seised to uses. 3 *Prest. Abst.* 22. Where *A.* being possessed of a term of 999 years by lease and release granted, bargained, sold, and demised it to trustees, on certain trusts, with remainder to the heirs of his wife, and covenanted that he was seised in fee; it was held, that though the settlement could not operate as a lease and release, yet *A.* being in possession, and the word 'grant' being in the deed, it should take effect as a *grant* or assignment of all his interest at law. *Marshall* v. *Frank*, *Prec. in Ch.* 480. And a demise has been held to operate as a grant in a case where there was a recital of an existing estate so as to create

As soon as the use is raised, it is executed by the statute without any enrolment, though the use be in fee.

a reversion; and it is obsrrvable, that a grantor cannot gainsay an averment in his own deed; by *that* he is estopped. *Doe* v. *Sherlock*, 1 *Fox & Smith*, 78. *Doe* v. *Saunders*, *ib.* 28. *infra*, 304. *Rees* v. *Lloyd*, *Wight.* 123. See also the late case of *Haggerston* v. *Hanbury*, *infra*, p. 301; where a bargain and sale, though enrolled, was held to operate as a grant, there being an outstanding term for years.

CHAP. XII.

OF A BARGAIN AND SALE.

2 *Bl. Com.* 333. *Touchst.* c. 10. p. 221. *Sand. Uses*, 404. A BARGAIN and SALE differs from the covenant to stand seised, as it must be in *consideration of money*, though that consideration be only nominal. If the use to be raised by it be for *a freehold interest*, it must be *enrolled*. In this, as in the last species of conveyance, there must be *a person to stand seised*; and therefore, in the case of a corporation, some other mode should be adopted. There must be *an estate* in him of which he has the *seisin*, as an *estate of freehold in possession, reversion, or remainder*; not a *mere right, contingency, or possibility*; and there must be a *person capable of taking the use*.

See 2 *Leon.* 121. *Ca.* 168.

Ante, b. 1. c. 20. p. 74. And it has been already observed, that an use cannot be limited on a bargain and sale to any but the bargainee. (*a*)

The operative words are "bargain and sale."

(*a*) Before the statute of uses, a *contract* for the sale of land raised a use, as in this day it raises a trust; to convert that use into a legal estate, an actual conveyance was

requisite; but now the statute of uses supplies that conveyance, and transfers the seisin of the vendor to the use of the vendee, who having thus the seisin and the use, becomes seised of the legal estate, without any further conveyance. Immediately after the statute of uses came the statute of enrolments, 27 *Hen.* 8. *c.* 16., which requires every bargain and sale of a freehold interest to be enrolled in Chancery within six months after its date; consequently, if the common agreement for purchase were enrolled on a sufficient stamp, it would operate as a valid conveyance by way of bargain and sale without any further legal instrument. From these observations, it is plain, that a use cannot be surmounted on the use thus executed by the statute in the bargainee, for that would be a use upon a use, and therefore a mere trust.

In a late case, a tenant in tail, in order to make a tenant to the *præcipe* for suffering a recovery, by indenture duly enrolled, bargained and sold the lands of which he was seised in tail to two persons, *to the use* of one of them, and that one was made the tenant to the *præcipe*, upon which a recovery was suffered. An objection was afterwards taken to the recovery, on the ground that the tenant had not the *legal* estate, the use to him on the bargain and sale being inoperative at law. This objection was considered fatal, but there being an outstanding term, the Court of King's Bench certified, that the bargain and sale (though enrolled) operated as a good *grant* of the reversion, and passed the freehold of the entirety to the tenant to the *præcipe;* and that, consequently, the recovery was valid and effectual. *Haggerston* v. *Hanbury*, 5 *Barn. & Cress.* 101. By the way it may be remarked, that a reversion on a term for years is scarcely a reversion in the strict legal meaning of the word. If it be a reversion, then is it in abeyance, which it cannot legally be. The reversioner is seised of the freehold in possession, and it is observable, that this *quasi* reversion cannot be *created* without livery; neither, therefore, should it be *passed* without livery. The foregoing case, however, as well as others, de-

cide, that such a right to the immediate freehold (which gives dower, &c.) lies in grant, and not in livery; and those decisious prevent both doubt and enquiry.

The enrolment of a bargain and sale must be made within six *lunar* months from the day of the date, if the deed have a date, and if not, within six lunar months from the time of its *delivery*. *Hob.* 140. 2 *Inst.* 673. *Shep. Touch.* 223. It may be made either upon the day of the date (2 *Inst.* 674.), or upon the last day of the six months, reckoning the day of the date *exclusively*. *Thomas* v. *Popham*, *Dy.* 218. The legal estate is vested in the bargainee by the statute of uses upon the execution of the deed; but the statute of enrolment obstructs the operation of the conveyance until it is enrolled. The enrolment, however, has, for most purposes, a relation to the delivery of the deed (2 *Inst.* 875.), and thereby avoids all mesne incumbrances and conveyances made by the *bargainor* between the delivery and enrolment. *Mullery* v. *Jennings*, 2 *Inst.* 674. *Thomas* v. *Popham*, *Dyer*, 218. *Owen*, 70.

A bargain and sale is an innocent assurance, and passes merely what the grantor may lawfully convey. It cannot, therefore, work a discontinuance (*Gilb. Uses*, 297. *Co. Litt.* 332 b.), or create a forfeiture. *Gilb. Uses*, 102. *Hard.* 416. If, however, a tenant in tail conveys in fee by bargain and sale, the bargainee has a base fee, determinable on the death of the tenant in tail by the *entry* of his issue. *Seymour's case*, 10 *Co.* 95. *Machil* v. *Clark*, 2 *Salk.* 619. 1 *Atk.* 2. Whether a tenant in tail can afterwards levy a fine to bar the issue is a point which is noticed in the Ch. on Fines.

From the general characteristics of a bargain and sale, as explained in this Chapter, it is manifest, that such an instrument cannot contain a power of appointment generally. To support a bargain and sale, a money consideration must pass between the bargainor and bargainee; and to the perfection of this instrument, the consideration must be paid at the

time the deed is executed, otherwise no use will arise, and then nothing passes from the bargainor, and so the deed is completely nugatory at the time it is executed. Now between the bargainee and an appointee under a power there cannot pass a present consideration, and consequently no use can arise; and as the seisin and the use are not separated, the statute cannot operate, consequently nothing is drawn out of the bargainor, neither the use by the deed, nor the seisin by the statute. The deed and the statute therefore operate nothing, and the whole is futile and void. *Et vide Gilb. U.* 46.

CHAP. XIII.

OF A LEASE AND RELEASE.

2 *Bl. Com.* 339. *Sand. Uses.* 461. *Butl* n. (1) *Co. Litt.* 271 b. *Ante* 35, *of this Edition.*

WE have already remarked, that a release can only be made to a person in the possession or seisin of the lands; and, therefore, if a conveyance of the freehold is intended to be made to a stranger, without the formalities of livery, an estate for a year, or other definite time, may be made to him in order to give him such possession or seisin, and so make him capable of receiving a release. (*a*) This may be done by a convey-

(*a*) In Ireland, the actual existence of a lease for a year is not required, it is sufficient if the release contains the usual reference to it. By the 9th *Geo.* 2. *c.* 5. *s.* 6. (Irish stat.) it is enacted, that in all cases the *recital* of a lease for a year in the deed of release, shall be deemed and taken to be full and sufficient *evidence* of such lease. In a late case, the words "in his (the releasee's) actual possession, now being by virtue of a lease made pursuant to the statute," were held an insufficient recital of the lease within this statute. The lands, however, being in lease, the release was held to operate as a grant of the reversion, from the *words* "*demise, set, and to farm let,*" notwithstanding there was a covenant in the instrument to make a *future grant.* *Doe* v. *Saunders*, 1 *Fox & Smith*, 28.

ance at common law, or under the statute of uses.

If an estate for a year be granted at common law, the lessee should make *an actual entry into the lands* before the release be made to him; and this should always be done when a corporation is the grantor, as a corporation cannot be seised to an use. If, however, the grantor *can* stand seised to an use, he may, to avoid the trouble of an actual entry by the grantee, make a bargain and sale, in consideration of money (though for a nominal sum only, as for 5*s.* which is never intended to be paid), to the purchaser for a year: an use will then arise which the statute will immediately execute without enrolment; (*a*) and when the purchaser be thus in possession or seisin (for a bargain and sale may be made as well of a reversion or vested remainder as of an estate of freehold in possession (*b*),) a release may be made to him. *Butl.* n. (3.) to *Co. Litt.* 270 a.

(*a*) The statute is confined to bargains and sales of "estates of inheritance or freehold." 27 *Hen.* 8. *c.* 16. *s.* 1.

(*b*) If an estate be limited to *A.* for five hundred years, with remainder to *B.* in fee, and *B.* makes a lease by bargain and sale to *C.* for one year to commence immediately; on a first impression the lease appears to be trivial and vain, but it is to be recollected that during that year the reversionary lessee, having an estate executed by the statute and not merely an *interesse termini*, is entitled to the rent reserved on the term

The proper words in the instrument on which the release is to be grounded are, if the instru-

of five hundred years, and as to that term the lessee for one year is the immediate reversioner and the proper person to take advantage of a forfeiture or merger of the prior term. Mr. Wooddeson, in speaking on this subject, seems to treat the lease for a year as a mere nullity. He asks, "How can a remainder-man or reversioner bargain and sell the present possession, which he is not himself intitled to invade? Or how can the law supply the actual entry of the lessee, when such entry would be wrongful and illegal? If indeed there is a subsisting freehold interest, the reversion or remainder expectant thereon may very consistently be passed away by release, by force of the word 'grant,' which is apt and usual on these occasions." 2 *Wood. Lect.* 303. In this passage the learned Vinerian Professor is understood to object to the inapplicability of the statute of uses to a bargain and sale of a remainder, for that the statute deals with the possession, whereas the very characteristic of a remainder is, that it wants the possession, *ergo* the statute does not apply, and the bargain and sale for a year being simply void, the release operates as a grant of the reversion. This reasoning may not be inappropriately applied to a lease at common law of an estate in remainder. Such a lease passes only an *interesse termini*, which requires entry to perfect it, and entry cannot be made in respect of a remainder. The statute of uses however deals with the seisin—not with the possession; and therefore it is not technically correct to say, in the language of every release, that "by force of the statute made for transferring uses into *possession*;" for the statute was made for transferring the *seisin* to the use, a thing very different; and it is moreover observable, that the statute expressly mentions reversions and remainders as part of the subjects on which it is intended to operate, and hence it is inferred that the learned professor's

ment is intended to operate *as a lease with entry,* "*demised, leased, and to farm letten;*" if otherwise, "*bargained and sold.*"

observations on this point are not so well founded as his remarks usually are.

If a mortgagee for a term purchase the equity of redemption it is usual for him to assign the term to a trustee to attend the inheritance. This should be done by an instrument bearing date two days previously to the conveyance of the equity of redemption, supposing that conveyance to be by lease and release. If the assignment bear date the day next before the day of the date of the release, it becomes a question whether the term is not merged in the lease for a year which the mortgagor makes on that day to the mortgagee, who must then be supposed to have the prior term. The assignment of the term would without doubt be presumed to have been made before the lease for a year, although at law there is no fraction of a day, but every thing done in the day is considered as being done on the first moment of the day, and if it be *proved* that the assignment was executed before the release all doubt on the subject must vanish, as there will not then have been two estates in the same person at one and the same time. But it is best to avoid the point, by dating the assignment two days prior to the date of the release.

CHAPTER XIV.

OF A DEVISE.

2 *Bl. Com.* 373. *Powell on Devises. Touchst.* c. 23. p. 399, &c.

SUCH are the principal instruments of conveyance which are amicable and not forensic, and to take effect in the maker's life-time; what we are now to speak of is a voluntary conveyance, but not to take effect till the maker's death. Till that time it may be altered or revokrd, either expressly or by implication. It is, as the law terms it, *ambulatory* till the testator's decease. But though it does not receive its consummation till the death of the testator, yet it shall relate, as to some purposes, to the time of its being made.

It cannot embrace any freehold property which was not in the testator at the time of its publication. If the testator, therefore, afterwards purchase lands, or do any act which might be construed into a revocation of such will, care should be taken to have it republished. (*a*)

(*a*) In Piggot *v.* Waller, 7 *Ves.* 118. it was held that a codicil referring to a will, passed after-purchased lands, though the codicil itself related to personalty only, there being a

The same strictness of expression is not of necessity in wills as in deeds, with respect to

general devise of lands in the will; and in Barnes *v.* Crowe, 1 *Ves. Jun.* 186., it was established, that every codicil, unless it be confined in expression, is a republication of a previous will, if such codicil be executed and attested according to the statute of frauds; and Lord Commissioner Eyre said, "If we disentangle ourselves from the rule, that there shall be no republication without re-execution; the principle that a codicil attested by three witnesses shall be a republication, seems intelligible and clear: the testator's acknowledgment of his former will, considered as his will at the execution of the codicil, if not directly expressed in that instrument, must be implied from the nature of the instrument itself, because by the nature of it it supposes a former will, refers to it, and becomes part of it; and being attested by three witnesses, his implied declaration and acknowledgment seem also to be attested by three witnesses." 1 *Ves. Jun.* 497. In Guest *v.* Willasey, 2 *Bing.* 429., this doctrine was acknowledged and acted on.

If a person contracts in writing to purchase lands, and then makes his will, devising the lands thus purchased to *A. B.*, and afterwards receives a simple conveyance to himself in fee, this conveyance will be no revocation of the prior will in *equity*, where the devisor's heir will be held to be a trustee of the legal estate (which will descend to him), for the devisee *A. B.*; but if the conveyance be taken to the common uses to bar dower, it will be a revocation of the appointor's prior will in consequence of the modification and alteration of estate which ensues upon the introduction of a power of appointment and the interposition of a trustee. *Rawlins* v. *Burgess*, 2 *Ves. & Bea.* 382. *Ward* v. *Moore*, 4 *Madd.* 368.

It is a rule in a court of equity to treat that as done which has been agreed to be done. Hence when one person agrees to sell an estate to another, the vendor is considered as

limitations, &c.; but, in the making of wills, too much care cannot be taken in pursuing those descriptions which the law has given, and in using technical terms in a technical sense.

having transferred the estate to the purchaser, and the purchaser as having paid the money to the vendor. The consequence is, that the vendor becomes seised of the legal estate in trust for the purchaser; and if he dies before he has conveyed the legal estate pursuant to the contract, it will descend on his heir or devisee in trust nevertheless for the purchaser, but the purchase-money will belong to the vendor, executor, or administrator, as part of his personal estate. The contract for sale is a revocation of the devise in equity, but not at law, and therefore the concurrence of the vendor's heir or devisee, will be necessary to complete the title. If the purchaser dies before he has paid the money and taken a conveyance, the price must be answered out of his personal assets, and the estate conveyed to his heir or devisee. The purchaser may devise the estate after contract, and a subsequent conveyance will not, as above noted, revoke that devise unless it make a new modification of the ownership; but as the will cannot operate on the *legal* estate unless republished after the conveyance, the legal estate will descend to the purchaser's heir, who will become a trustee for his devisee. *Brown* v. *Monk*, 10 *Ves.* 597. 2 *P. Wms.* 332. 623. *Seton* v. *Slade*, 7 *Ves.* 274. *Gaskaith* v. *Lowther*, 12 *Ves.* 214. With respect to leasehold estates, it has been long settled that a surrender of a lease for lives, and the taking a new lease, will operate as a revocation of a prior devise of it. For the testator, by the surrender, divests himself of his whole estate in the old lease, and by the renewal acquires a new interest. *Marwood* v. *Turner*, 3 *P. Wms.* 163. *Slatter* v. *Notton*, 16 *Ves.* 197. 11 *ib.* 383.

A devise of freehold lands (*a*) need not be under *seal* as a deed, but must be in writing, and signed by the party devising, or some other person in his presence and by his express directions, and attested and subscribed, in the presence of the devisor, by three or four credible witnesses. (*b*)

Statute of Frauds, 29 Car. II. c. 3.

(*a*) The trust of a term for years attendant on the inheritance is considered as part of the inheritance, not as a chattel real, and can be disposed of only by a will attested by three witnesses. *Whitchurch* v. *Whitchurch*, 2 *P. Wms*. 236.

(*b*) A devise must also be *published;* that is, the devisor must do some act from which it can be concluded that he intended the instrument to operate as a will or devise. Lord Hardwicke has mentioned a case (3 *Atk*. 161.) where, upon a trial at bar in the Court of King's Bench, the question was, whether the testator had *published* his will, notwithstanding it was apparent on the face of the will that it was executed in the presence of three witnesses and attested by them in the presence of the testator. This shews that publication is, in the eye of the law, an essential part of the execution of a will, and not a mere matter of form. The words, 'signed and *published* by the said *A. B.* as and for his last will and testament,' are a sufficient publication; and the delivery of a will, as a deed, has also been held to be a publication of it. *Peate* v. *Ongly*, 1 *Com. R.* 196. *Trimmer* v. *Jackson*, 4 *Burn's Ecc. Law*, 119.

A will of freehold lands need not be *proved* in the Ecclesiastical Court. The *probate* cannot be given in evidence in any other Court; the original will must be produced, which may be obtained by application to the Court of Chancery for an order to the Ecclesiastical Court to have the will delivered. 1 *Atk*. 627. 4 *Bro. C. C.* 476. *Cro. Car*. 296. 346. 4 *Burn*.

Eccl. L. 195. But wills of chattels real and terms for years, which vest in the executors, require proof in the Ecclesiastical Court having jurisdiction where the lands lie. Whether a trust term for years is *bona notabilia* in the trustee, is a point not yet definitively settled. This subject it is understood received some discussion in the recent case of *Stokes* v. *Bates*, in the King's Bench, May, 1826.

A will may also be proved *per testes* in the Court of Chancery, if there be any doubt of the sanity of the testator, by which means the validity of the will is at once decided on without an issue at law. Formerly, where a vendor claimed under a modern will, by which the heir at law was disinherited, it was usual to require the will to be proved in this way against the heir: but now this practice is almost wholly abandoned, and it seems clear that a Court of equity will not compel a vendor, at the suit of a purchaser, to prove a recent will *per testes*. *Fearne, P. W.* 234. *Colton* v. *Wilson*, 1 *Pr. Wms.* 239. *Sug. V. & P.* 325. *6th ed.*

CHAPTER XV.

OF A FINE.

A FINE is the compromise of a fictitious suit, and operates either by passing an interest, or by way of estoppel.(*a*) 2 *Bl. Comm.* 348. *Co. Litt.* 121 a.

In order to pass an interest, the cognizor or cognizee must have an estate of *freehold* in the premises, either in possession, remainder, or reversion, or be *cestui que trust*, of such an estate; for, otherwise, a person not bound by estoppel might vacate the fine by pleading *partes finis nihil habuerunt*.(*b*) But whether *Touchst.* 13. [2 *Sch. & Lef.* 99.]

(*a*) Thus, although a fine levied by persons who have no estate of freehold in the lands, is void as to strangers, yet it will operate as an estoppel against the persons who are parties to it. Thus if two are seised in fee, and a stranger levies a fine to them and to the heirs of one of them, the other will be thereby estopped from claiming any thing more than an estate for life in the lands. *Shep. Touch.* 14. As to a fine operating by estoppel when levied by an expectant heir see *Helps* v. *Hereford*, *ante p.* 200.

(*b*) If a tenant for years, wishing to acquire the fee, levies a fine, it will be a forfeiture of his term to him in reversion, who

the freehold be in the cognizor or cognizee either by right or by wrong, is of no consequence; and hence, when a fine is to be levied in order to strengthen a title, *a feoffment* may often be necessary, as the cognizor or cognizee would then, at least, have the freehold in him *by disseisin.**

may immediately commence an ejectment for recovery of the possession, and if the fine be set up against him, the plea of *partes finis* will effectually remove it; and although he may not commence his ejectment till five years after the fine, yet the non-claim will not hinder him, as the same plea will be available. If the reversioner allow twenty years to elapse after the levying of the fine, he must change his action, but the plea will still avail him. If however he sleep on his title for thirty years, his remedy will be entirely lost; but if he die before thirty years then his heir will have thirty years longer to bring his real action in. See the stats. of limitation *infra.*

* But if the feoffment be *fraudulent*, the fine may be reversed. See 3 *Co.* 78. in *Fermor's case*, *Cowp.* 694, &c. 1 *Burr.* 117.—*Note by Mr. Watkins.*

In *Fermor's case*, 3 *Co.* 78. a lessee for years had fee-simple lands of his own in the same township where his leasehold lands were situate. He made a feoffment of the whole, and thereupon levied a fine to the use of himself in fee; he still however continued to pay rent for the leasehold lands until five years elapsed, when he set up the fine and non-claim as a bar to his lessor. Ten of the Judges (two *dissentiente*) held, that the original lessor was not barred by this fine, because of the secret and fraudulent manner in which it was levied; and it was asked, how the lessor could make his entry or bring his action when he knew not of the feoffment which did the wrong? And as the lessee had lands in fee-

If there be no interest in the person levying the fine, none can of consequence pass. The

simple in the same town, every one would presume that the fine was levied of that whereof it might lawfully be levied. And although the fine contained in reality more acres than the lessee's own lands, yet that was usual in almost all fines; and peradventure the lessor knew not the just quantity of the lessee's own land, a knowledge which did not pertain to him, and the fraud it was said was the more odious in this case because it occurred between the lessor and lessee, between whom there was a trust and confidence. But when a disseisor (although he gains a possession by wrong) levies a fine with proclamations, it shall bind the disseisor if he permit five years to run upon it, for a disseisor *venit tanquam in arena*, and it is not possible but that the disseisee to whom the wrong is done and who hath lost his possession, should be conusant of it; and therefore it will be his own folly if he make not his claim in due time. *Fermor's case*, 79 b. The doctrine mentioned, *ante*, p. 253, was certainly not meant to apply to a case where there is only a short term of years yielding a valuable ground or other rent, but only to cases where a person is possessed of a term of 500 or 1000 years at the rent of a pepper-corn, the reversion being remote and valueless. If such a lessee assigns his term to *A. B.*, and then enters and delivers seisin on a feoffment, and levies a fine to the feoffee to the use of himself in fee, and five years elapse without his noticing or acknowledging the original lessor, and without any mention being made in the assignment of the intended feoffment, this seems a clear case of bar at law, because there is no fraud as between the owner of the term and the parties to the feoffment; and it is apprehended that a Court of equity will not presume that the trustee was privy to the feoffment, merely because he holds the term in trust for the feoffor. But whether the Court of Chancery will compel a purchaser to take a title, depending on a point of

fine, in that case, if it operate at all, can only operate *by conclusion or estoppel*.

Estoppel

All *parties* to a fine, whether any interest pass or not, are concluded, as every one shall be concluded by his own deliberate act.

Hob. 333.

Privies (who are also estopped) are either privies *in estate*, as the donor and donee; *in blood*, as the heir and ancestor; or *in law*, as the lord and tenant, &c.(*a*)

this kind, is a question which has not yet been judicially mooted. If there be no fraud at law, as it is assumed there is not in a case thus simply circumstanced, the bare declaration of trust in the assignment will not, it is conceived, constitute the case a fraudulent one in equity; see the late case of *Reynolds* v. *Jones*, 2 *Sim. & Stu.* 206, *et ante*, p. 254.

(*a*) If a donee in tail levies a fine in fee, with proclamations, and dies without issue, and the donor or his grantee omits to enter or claim within five years after the death of the donee, the donor is barred by force of the statute, as being privy in *estate*. If an ancestor levies a fine, and a person claiming the estate as heir can deduce his title only through that ancestor, he will be estopped by the fine as being a privy in *blood*; but if he can make his title without claiming through the person levying the fine, he will not be estopped. As if a heir in tail levies a fine in the lifetime of his ancestor, and dies, leaving a son, and then the ancestor dies, the grandson will be estopped by the fine as a privy in blood, for he can make out his pedigree only through the person levying the fine. But where an eldest son levied a fine of an estate which was then vested in his mother in tail, and died in her lifetime without issue, and the estate de-

Strangers to a fine are all persons who are neither parties nor privies.

In order to bar an estate tail by fine, the privies must be privies *in estate;* that the issue be privies in blood only is not enough. The issue, to be barred by a fine, must claim *the estate* from the person levying it, or derive his title through him. If lands, therefore, be given to *A.* and the heirs *female* of his body, and he have a son and a daughter, and the *son* levy a fine and die, the daughter shall *not* be bound; for though she be heir to the son, and so privy *in blood* to him, yet she is *not* privy to him *in estate,* as she does not claim it from or through him. But if lands were given to *A.* in tail general, and his eldest son, in the lifetime of *A.* levy a fine, the entail will be barred on the death of *A. if the son survive him;* for the issue of *A.* will be privies both in blood and estate to *A.*'s eldest son.(*a*) See *Cro. Car.* 434. Bradstock *v.* Scovell & *al.*

scended to his brother as next heir in tail, it was adjudged, that this fine did not bar the brother, for as the estate tail never descended to the elder brother, the younger brother was not privy to him. *Bradstock* v. *Scovel, Cro. Car.* 434. *et infra* in the text. The estoppel by privity *in law,* mentioned in the text, seems to be inapplicable to any case likely to occur at the present day.

(*a*) But the eldest son's *issue* would be barred by the fine, although he himself should not survive his father, for his issue could only claim through the person who levied the fine.

1 *Fearne*, 535. If *a contingent remainder* be limited to *A.* in tail, and, before the contingency happen, he levy a fine, his issue shall be barred; for though *A.* was never *seised* of an estate of freehold in the lands so entailed, yet, as whoever claims such lands by virtue of the entail must claim *from him* as the first taker, they must be privies both in blood and estate to him, and so be bound by the statute.(*a*)

(*a*) The effect of a fine levied by the expectant owner of a contingent estate tail to a stranger, is to extinguish the contingent remainder for the benefit of the reversioner, and to bind the issue in tail to that extinguishment. Such at least appears to be the opinion of a very eminent conveyancer (1 *Pres. Conv.* 302.); and a late case in the Court of Exchequer (*Davies* v. *Bush*, 1 *M'Lel. & Yo.* 58.) has reluctantly admitted that doctrine to be well founded. The point, however, appears not to have occupied the direct or serious consideration of the Court, and whether it will be acted on at this day may perhaps be a matter of some doubt.

If the owner of an estate in fee subject to an executory devise, levies a fine, and five years elapse after the event happens upon which the estate is to go over to the executory devisee, it is not settled whether such fine and non-claim will bar the executory devise. In deciding this question, it will be first necessary to consider, whether the possession of the tenant in fee *after* the executory event has happened, is adverse to the title of the executory devisee who makes no entry or claim. If the possession be withheld after entry or claim, then such detention of the possession is a species of deforcement; but until entry or claim, the tenant in possession having entered by lawful title, is to be viewed as a tenant at sufferance; and we have seen (*ante*, p. 24 *of this edition*) that the possession of such a tenant is *not adverse* to the per-

So if lands be given to *A*. and *B*. and the heirs of the body of the survivor, and they *join* in levying a fine, the entail will be barred; as the issue, who would claim the entail, must be privy both in blood and estate to one or the other of them; and they wêre *both* bound by the fine. 1 *Fearne*, 521. & see *Butl.* n. (1.) to *Co. Litt.* 191 a.

So if lands be given to husband and wife and the heirs of their two bodies, and the husband alone levy a fine; the issue would, at 2 *Cruise*, 163. 8 *Co.* 72.

son entitled to enter, if so, the non-claim on the fine cannot commence until the executory devisee has entered or claimed.

If a tenant in tail discontinues by a *tortious* conveyance and takes back a base fee, and then levies a fine and retains possession for five years after the base fee has determined, the remainder-man or the reversioner will be barred, because the discontinuance, being by *tortious* conveyance, turned their estates into mere rights and constituted in itself a possession adverse to those in remainder; but it would be otherwise if the discontinuance had been created by an innocent assurance, as then the estates of those in remainder would not have been divested, and the fine being then only of the base fee, would not have affected the issue in tail or remainder-men. This case, therefore, seems different from that where a fine is levied by a tenant in fee subject to an executory devise: such a fine may be properly levied, and the effect is merely to pass the estate, not to destroy or divest the executory devise, which is but a bare right till the executory event happens; then it becomes an estate, and if the former tenant, retaining possession afterwards, levies a fine, and the executory devisee allows five years to elapse without entry or claim, he may well enough be barred.

least before the statute 32 *Hen.* 8. c. 28. s. 6 have been barred, as they must be privy both in blood and estate to the husband as well as to the wife.(*a*)

2 *Cru.* 162. [*Cov. Rec.* 213.] A widow is prohibited by statute from levying a fine of lands moving from her husband.

(*a*) The same consequence would it is apprehended ensue now. The statute enacts, (*sect.* 6.) that no fine by the husband alone of any lands, being the inheritance or freehold of his wife, during the coverture between them, shall in any wise be a discontinuance thereof, or be prejudicial or hurtful to the said wife or to her heirs; but that the same wife and her heirs may lawfully enter into all such lands any such fine, feoffment, or other act to the contrary notwithstanding.---The husband and wife are tenants by entireties in tail; if the husband dies, the entire estate tail survives to the wife, who may levy a fine or suffer a recovery thereof to the use of herself or a stranger in fee; but if she dies without having destroyed the entail, it descends to the issue, who, though they inherit from their mother, as the person last seised, are obliged to make their pedigree through their father also; and he having levied a fine, the descent through him is estopped, and the issue being thus heir to one only of the donees cannot inherit. *Greneley's case*, 8 *Co.* 71 b. The statute of Hen. is obviously confined to inheritances of the wife *alone*, and does not embrace inheritances of which she is seised *jointly* with her husband. As against the wife surviving, the husband's fine would not be available, unless the land originally belonged to the husband. Then indeed she would be a tenant in tail of the gift or provision of her husband, and could not alien in fee after her husband's decease without the consent of the heir in tail, or the person next entitled in remainder, *vide Stat. of Jointure*, *infra Ch. Stats.*

So if a gift be made by the crown as a reward for services, to a person in tail, the tenant in tail is restricted from barring such entail by statute. 34 & 35 *Hen.* 8. *cap.* 20. [*Cov. Rec.* 221.]

A fine is no bar to a remainder or reversion which is in another person, so he claim within the time prescribed by the statutes; for the remainder-man, or the reversioner, claims paramount the cognizor: but, if the tenant in tail have the reversion in himself, he may pass a clear fee. The operation of a fine, in the latter case, would be this:—the tenant in tail would, by such time, pass a *base fee* to the cognizor, derived from the estate tail, and also a clear and absolute fee of which he was seised in reversion; and as two fees cannot subsist together in the same person, the base fee shall merge in the absolute one, which would, consequently, come immediately into possession. 1 *Salk.* 338. Symonds *v.* Cudmore, 5 *Durnf.* & *East.* 109. note.

But as a tenant in tail may *charge* his reversion, care must frequently be taken how the reversion be brought into possession, lest the charges immediately attach. It may, therefore, often be prudent to suffer *a recovery;* which would give a new fee not subject to those charges.(*a*) But, even in the case of a reco- *Cru. on Fines*, 271. *Cru. on Recov.* 284.

(*a*) But unless some incumbrance appears, or the title to the reversion is not clearly deduced, the Court will not compel a vendor to suffer a recovery on a mere conjecture that the

very, the estate will be chargeable *as to the acts of the recoveree himself*, upon the principle that no man shall be permitted to defeat his own charges by an act of his own. A recovery,

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reversion has been incumbered. Thus, in a late case, (*Sperling* v. *Trevor*, 7 *Ves.* 497.), upon an exception to the master's report in favour of the title, the objection was, that one Elizabeth Baker ought to join in a recovery; the title being derived from John Paine, who in 1693 limited the estate to the use of himself for life, with remainder, (subject to a term), to uses which never arose; with remainder, to his daughters in tail; with remainder to himself in fee. Under these limitations Elizabeth, an only daughter, became seised in tail, with the immediate reversion to her father, who made a will, not executed so as to pass real estate, whereby he devised all his estate to his second wife. Upon his death, Elizabeth his daughter entered, and levied a fine to the plaintiff, in fee. The defendant, the purchaser, suggested, that the ultimate remainder in fee might have been disposed of by John Paine, and if so, it could not have been barred by the fine which had been levied, therefore he insisted on a recovery to clear up all doubt. The Lord Chancellor, however, held that a recovery was not necessary, and decreed the purchaser specifically to perform his contract. 7 *Ves*. 497.

It will occur to the learned reader, says Mr. Sugden, that, notwithstanding the defendant's suggestion, it was highly improbable that the reversion was disposed of by John Paine in his lifetime, such an interest not being marketable; and as he devised all his estate by his will, there was no ground to presume that he made another will. Upon his death, therefore, the reversion descended to his daughter, who by her fine reduced it into possession, and consequently no incumbrance could afterwards be created upon it, as a reversion distinct from the particular estate. *Sug. V. & P.* 314.

therefore, only lets in the charge of *the person suffering it,* while a fine will let in the charges of *the ancestors seised of the reversion as well as those of the cognizor.*

As a recovery immediately bars remainders over in another, which a fine will not do, as well as prevents the charges of the ancestor of the recoveree from attaching, it is generally the most effectual assurance. (*a*) A fine, however, is sometimes the preferable one, and often the only one to be adopted. (*b*)

(*a*) Especially as the extra cost of a recovery over a fine will in general be found to be less than the expense of investigating and proving the title to the reversion.

(*b*) A recovery can be suffered in term time only; but a fine may be levied during the vacation. If the tenant in tail be dangerously ill in the long vacation, and he wishes to acquire the fee for the purpose of devising it in a different channel from that prescribed by the entail, as a recovery cannot be suffered till the ensuing term, the next best step is to acknowledge a fine to the intended tenant to the præcipe, preparatory to a recovery being suffered, with uses for the benefit of the tenant in tail until the recovery shall be completed; as then the entail will be barred at all events, and the tenant in tail may, in a subsequent term, should he survive, suffer a recovery, and the fine and recovery will both together form but one assurance. The base fee acquired by the fine may then be devised, either for payment of debts, or among children and relatives, instead of being permitted to descend to the next heir in tail, who may possibly be of distant kindred.

1 Co. 81 a.

A fine will, in certain cases, bar *by estoppel* where a recovery will not do so. A fine may be levied of an entail *in remainder* without the concurrence of the person having the freehold; but a recovery cannot be suffered but by the act of the person having *the freehold in possession.* (*a*)

1 Cru 151. 3 Co. 86 a. &c.

But, in order to *bar* an estate tail, whether in possession or remainder, the fine must be with *proclamations,* according to the statute; for otherwise it will only work *a discontinuance.* (*b*)

(*a*) So a fine is the preferable assurance for obtaining a speedy bar by non-claim. On a recovery the bar is measured by the statute of limitations. On a fine it accrues in five years from the last of the four proclamations, that is in fact in six years from the time it is levied.

Discontinuance.

(*b*) A discontinuance causes a suspension of the title under the estate tail, and gives a new title to an estate in fee-simple by force of the alienation. It is an abandonment of the estate tail, and the assumption and conveyance of a *new* and wrongful estate in fee. If a tenant in tail discontinues and takes back an estate tail, the new entail will devolve in the channel marked out by the discontinuance, and not in that prescribed for the entail discontinued. But to enable a tenant in tail to create a discontinuance, he must be seised of the immediate estate of freehold in fact or in law by virtue of the entail; if he has a mere right, or an estate tail in reversion, his conveyance will not thus operate. In Roe *v.* Elliott, 1 *Barn. & Ald.* 85., a tenant in common in remainder levied a fine of the entire estate and afterwards obtained possession of the whole premises. His companion brought an ejectment against him, when it was objected that the fine operated by discontinuance, and that an entry was therefore necessary to avoid the fine

If a married woman be party to a fine, it will bar her, it being a matter of record, as the compromise of a suit ; and, in levying it, the woman is Harg. n. 1.(C.) to Co. Litt. 121 a.

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in order to support the ejectment. The court held otherwise, and gave judgment for the plaintiff.

The *consequence* of a discontinuance is, that it takes away from the issue aad remainder-men their right of *entry*, and from the remainder-men and reversioner their power of alienation to a *stranger*. It converts the interest of these persons into *rights of action*, which cannot be devised or assigned, but such rights may be *released* to the person in possession or bound by estoppel; and the action to be used for the restoration of these rights is not an ejectment, but a species of real action called a *formedon*, which, as to the issue, cannot be commenced until after the death of the tenant in tail, and as to those in remainder cannot be maintained until after a failure of the issue and a determination of all prior remainders; moreover such a writ must be brought within twenty years after the right has fallen by the statute of limitations, 21 *Jac.* 1. *c.* 16.

But the tenant in tail discontinuing, and also the issue in tail for the time being after his death, provided the entail ever gave a vested interest, may bar the entail by fine, and the remainders by recovery, although the entail and remainders have no continuance as a seisin, and by that means convert the base fee created by the discontinuance, into a fee-simple, and the tenant of the base fee may, by fine with proclamations and five years non-claim, bar the issue and remainder-men after their rights have accrued. A distinction, however, should be noticed as to the power of the tenant of the base fee to obtain the effect of non-claim. If his estate be created by an innocent assurance, then his fine will be nugatory on the issue and remainder-men; but if his estate be created by tortious alienation, then the entail and remainder having been once discontinued, and the interests under them turned into mere rights, the non-claim on the base-tenant's

examined apart from the husband, that any compulsion on his part may, as much as possible, be avoided. A fine, therefore, is essential to give validity to her conveyance of freehold lands (except where a recovery is required), and is most commonly levied for the purpose of barring her claim to dower. (*a*)

Plowd. 514. Eare *v.* Snow.

fine will bar those divested rights. This subject is amply discussed in 1 *Pres. Abs.* 367. 375. 2 *ib.* 306. 318. 413. *et infra Ch. Rec.* last note there.

(*a*) Equitable estates and interests in married women require the aid of a fine or recovery to pass or incumber them in the same manner as if the estate or interest were legal, except in the instance of a conveyance to trustees in trust for the *separate use* of a married woman with power for her to assign and dispose of the same notwithstanding her coverture. The maxim is *equitas sequitur legem*, and in all cases where a fine or recovery would be necessary if the estate were legal, *there* a fine or recovery will be requisite to pass an equitable estate or interest. In Wright *v.* Cadogan, 2 *Eden* 258., Lord Northington observed, "that there was no rule so certain, so general, and so strongly adhered to by the ablest judges who had presided in equity, as to observe *in omnibus* the rules of law with respect to the regulation of property, and that such rules had been always strictly observed as principle in a court of equity:" and per Lord Hardwicke there are but two ways by which a married woman can prevent the inheritance of an estate settled to her separate use from descending upon her heir at law, namely, by reserving such power to herself by a conveyance to uses and trusts before the marriage, or else *by fine*, in which she and her husband shall join after the marriage, with a deed to lead the uses of it, reserving such power to herself. And his Lordship denied that a woman

As an use immediately arises on a fine, such use is immediately executed by the statute, and may be led or declared as the parties please. See *Walk.* on *Desc.* 18. n. (z.) p. 28, 2d edit.

having a real estate before marriage could, in consideration of that marriage, enter into an agreement with her husband, that she may, by writing under her hand executed in the presence of witnesses, or by will, dispose of her real estate. He said that this rested in agreement, and that though it might bind her husband from being tenant by the curtesy, yet that it could not bind the wife's heir. Hence it is inferred that Lord Hardwicke was of opinion that the mere limitation of a real estate to the separate use of a married woman and her heirs, does not confer upon her the power of disposing of the reversion as she pleases. Mr. Roper, in treating of this subject, thus lays down the doctrine:—With respect to rents and profits of real estates, a gift of them to the wife for her separate use, enables her to dispose of them as a *feme sole* in the same manner as she may do of personal estate so limited to her; but in the following respect there is a difference between the two estates; a limitation of real estate to the wife in fee to her sole and separate use, without expressing more, will not enable her to dispose of it during the marriage otherwise than by *fine or recovery*, because no power having been given to her by the instrument to make any disposition of the property, she can only do so by the mode prescribed by the general law, and if she omit to do so her heir will take the estate; but it has been settled that when *personal property* is given or agreed to be given, to the separate use of a married woman, she may dispose of it as a *feme sole* to the full extent of her interest, although no particular form to do so is prescribed in the instrument for the purpose. 2 *Rop. Bar. & Fem.* 185. citing 1 *Bro. C. C.* 16.

The proper way of limiting real estate to a married woman for her separate use is to convey it to trustees and their heirs

to such uses as the wife shall, whether single or covert, direct or appoint, and in default of appointment and subject thereto in trust for the separate use of the wife, with a clause making the receipts of the wife or the person to whom she should appoint or assign the same valid discharges, with a power in the wife to change the trustees as often as shall be necessary.

CHAPTER XVI.

OF A RECOVERY.

AS a fine is the *compromise* of a fictitious suit, so a recovery is a fictitious suit *carried on to judgment*. 2 *Bl. Comm.* 357. *Touchst.* c. 3. p. 37. *Pig on Recov.* 2 *Cruise.*

By the common law, the person who had the immediate freehold, or freehold in possession, was to answer the claims of strangers. Against him the writ, or *præcipe*, was brought. Hence, to this day, no recovery can be suffered, unless *the recoveree has the freehold in possession in him*; as the recovery, or suit, is founded on the *præcipe*, which can only be sued out against *the tenant of the freehold*.

A person, therefore, who has an estate tail *in remainder*, cannot suffer a recovery alone; the tenant of the particular estate of freehold in possession must concur, against whom, or against whose alienee, the *præcipe* must be brought; and the remainder-man must come in *by voucher*. A recovery may, indeed, be now

2 *Cru.* 239. So a recovery may be of *Tithes*, &c. by the *stat.* 32 *Hen.* 8. c. 7. s. 7.

suffered of *a trust estate*, without the concurrence of the person in whom the legal estate is vested; but this is only from necessity, and to preserve an analogy in the assurance, or mode of destroying an estate tail.(*a*)

Equitable recovery.

(*a*) A recovery of the equitable estate must in all respects imitate a recovery of the legal estate, so as to keep up a strict analogy between them.

1st. There must be a recovery deed, or rather an assignment of the equitable freehold to the tenant to the *præcipe*, if it be intended to suffer the recovery with double voucher.

2nd. There must be an original writ, with judgment and execution thereon, the same as in a legal recovery; for the truth is, that there is not any distinction as to form and ceremony between an equitable and a legal recovery.

3rd. There must be a good tenant to the *præcipe*. He must have an estate of equitable freehold, that is, a right to the immediate beneficial interest in possession. Thus, if the legal estate in fee be limited to trustees in trust for *B.* for life, with remainder to *C.* in tail, with remainders over, *C.* cannot suffer an equitable recovery without the concurrence of *B.* But it is not requisite that the tenant to the *præcipe* have the equitable distinct from the legal freehold; the legal estate in him will not be any objection to an equitable recovery. 3 *Ves.* 126. 188. Thus, if *A.* be the owner of both the legal and equitable estate for life, his concurrence will nevertheless be necessary; and a recovery suffered on a writ brought against a tenant, to whom the legal estate has been conveyed in conjunction with the beneficial interest, will be deemed an equitable recovery. 1 *Bro. C. C.* 78. 3 *Pr. Wms.* 171. 3 *Ves.* 128. In a case where the legal estate was limited unto and to the use of *A.* for life, with remainders over, and afterwards the next remainder-man covenanted to settle the estate on him in tail, so that he had an equitable

The person *against whom* the writ is brought is called the *tenant*, as he was always *the imme-*

estate tail and a legal estate for life, and *A.* suffered a recovery, it was objected, that he being a tenant for life at law, ought first to have obtained a conveyance according to the articles, in order that he might have been seised of the legal estate in tail likewise; in effect, that a recovery suffered on a tenancy to the *præcipe* so constituted could not bar the equitable estate tail and remainders over. But the Court held otherwise. 2 *Freem.* 180. 1 *Ch. Ca.* 49. 213.

A recovery by a tenant in tail of an equity of redemption, expectant on a mortgage in fee, will enlarge the equitable estate tail into an equitable fee simple. If the mortgagee joins, the recovery will be partly legal and partly equitable; and although it will not be open to objection on that account, yet it will be more conformable to the practice of scientific conveyancers not to require the concurrence of the mortgagee. The late case of *Nouaille* v. *Greenwood*, 1 *Turn.* 27. has confirmed the practice in this respect, and decided that the concurrence of the mortgagee is not necessary.

4th. There must be a voucher of the equitable tenant in tail and a recovery over in value against the common vouchee, to enable the recovery to bar the equitable entail. 2 *Ch. Ca.* 63. 78.

5th. The remainders must be equitable as well as the particular estate. Thus, under the old uses to bar dower, a conveyance was made to *A.* and *B.* and the heirs of the said *A.*, nevertheless as to the estate of the said *B.* in trust for the said *A.* his heirs and assigns. *A.* died in the lifetime of *B.*, and conceiving himself to be entire owner, devised the estate to *C.* in tail, who suffered a recovery, without the concurrence of *B.*, which was held bad. 3 *Barn. & Cress.* 799. By the above limitation, *A.* and *B.* took as joint-

diate tenant of the freehold. The person *suing the writ* is called the *demandant,* as he *claims* or *demands* the premises as his right and inheritance, alleging that the tenant had *disseised* him, or at least had come in *under* the *disseisor,* or in *the post.* The tenant then *calls on the remainder-man,* or *the person under whom he claims, to warrant his title,* which is denominated *vouching* the person, who is thence called the *vouchee.* The vouchee either vouches over, or makes default.(*a*) On default made,

tenants for life, with a several inheritance to *A.* in fee: on *A.*'s death the whole estate survived to *B.*, who, nevertheless, held it in trust for *C.*: so that *C.* had the equitable freehold for the life of *B.*, and a legal remainder in tail. His recovery could only operate on his equitable interest; and consequently the legal entail and remainders were not barred. But though an equitable recovery will not affect the legal estate nor any interest therein, a legal recovery will, if the person suffering it have also the beneficial ownership, bar both the legal and equitable entail, remainders, and reversions; yet it should be kept in view, that an equitable remainder, though in the person who has the whole legal fee, may be barred by an equitable recovery. 3 *Ves.* 120. 18 *ib.* 395. 419. 11 *East.* 458. *S. C. contra.* 3 *Taunt.* 316. *Et vide* for further on this subject, *Grenville* v. *Blyth,* 16 *Ves.* 224. *Cov. Rec.* 321.

(*a*) He never makes default, but always vouches over the common vouchee. It is the common vouchee who makes default, and on that default judgment is given that the first voucher be recompenced by the common vouchee for the lands lost by his

judgment is given that the demandant recover against the tenant, and that the tenant recover against the vouchee or warranter, and so on, which is called the *recovery in value*, or *recompence*, and is always supposed to go *as the lands would have gone if they had not been recovered.*

When the *præcipe* is brought *immediately against the tenant in tail,* it only bars him of the estates of which *he is then actually seised.* It is, therefore, usual for him to convey an *estate of freehold to another person,* that the *præcipe* may be brought against such person (who is called *the tenant to the præcipe*), *and that such person may vouch the tenant in tail;* for if the tenant in tail comes in as *vouchee,* it bars every latent

inefficient warranty. This recompence (consisting of lands of equal value) is supposed to pass from the common vouchee to the first vouchee, to be holden by him in tail with remainders over, in the same manner as he held the lands recovered from him; and this fictitious recompence is the sole cause of bar. Whence it is evident, that if the first vouchee makes default, there is no one from whom he can recover a recompence to descend in the channel marked out by the original gift, and consequently that the issue and remaindermen will not be barred. The importance of a voucher of a common vouchee is hence apparent. In practice, it is common to require evidence of this voucher; but as it is mentioned in the exemplification, that the common vouchee was vouched over, it cannot be necessary to go further. Indeed, a recovery cannot be recorded without a voucher of the common vouchee.

right and interest which he may have in the lands.

If the *præcipe* be brought *immediately against the tenant in tail,* and he vouch over the *common vouchee,* it is called a recovery with *single voucher;* if against *the tenant of the freehold,* and he vouch over *the tenant in tail* and *the tenant in tail vouch over the common vouchee,* it is called a recovery with *double voucher;* and so on, according to the number of persons vouched. And it is always proper to suffer a recovery with at least a double voucher, if an entail is to be barred, for the reasons before alleged.

Ante b. 2. c. 15. & *vide post.* b. 3. c. 4. [Blosse v. Clanmorris, *ante* p. 193.]

A recovery bars not only an estate tail, but all remainders or reversions expectant upon it if they are not in the crown. (*a*)

(*a*) It expands the entail into a fee commensurate with the estate of the person who created the entail, at the same time barring and destroying all remainders and reversions over which after an estate tail are considered as mere cyphers. 5 *T. R.* 107. A fine, on the contrary, extinguishes the estate tail and accelerates the reversion. Cross and contingent remainders are also barred by a recovery, and all conditions, springing, shifting, secondary and future uses, collateral and conditional limitations, executory devises, powers, authorities, and other estates and interests annexed to the estate tail; and also all rents, liens, charges and incumbrances subsequent to the same, provided the recovery be suffered before the con-

The recoveror, generally speaking, gains a clear and absolute fee on his recovery of the premises, not subject to any charges but to those of the recoveree. Hence it is preferable, in some cases, to a fine, though a fine might bar

dition or event happen on which the proviso or conditional limitation is to take effect. *Butl. Fearne*, 73. 428. 7th ed. 1 *Mod.* 108. 2 *Lev.* 29. 2 *Salk.* 570. *Pig.* 176. *Cowp.* 379. 4 *Burr.* 19. 5 *Madd.* 371. 8 *Taunt.* 861, where a power of sale was held destroyed by a recovery. But this is the effect of a recovery when suffered by a tenant in tail, whose proper and peculiar mode of assurance a recovery is. When a recovery is suffered by a tenant in fee-simple, it operates merely as a conveyance, not as a bar. Hence an executory devise on an estate in fee cannot be barred by a recovery, but if it be annexed to an estate tail, it may, *ante* p. 183. A recovery by tenant in fee operates as a conveyance not as a bar.

Another peculiar effect of a recovery by a tenant in tail is to render valid all former acts of ownership exercised by him, and to confirm and let in all his preceding incumbrances. Thus if he make a lease contrary to the statute, mortgage his estate tail, acknowledge a judgment, enter into a recognizance, or execute a bond, and then suffer a recovery, the several incumbrances will thereby become available charges on the inheritance, and be entitled to take precedence to any estate created by the recovery. If a tenant in tail makes a settlement by lease and release, and then suffers a recovery, it is apprehended that this recovery will not deprive the *cestuis que use* under the settlement of the *legal estate*. Before the recovery those persons had a base fee which the recovery enlarges into a fee-simple. As to the effect of a recovery on a prior will, see 1 *Pow. Mortg.* 112 a. 113.

the estates, as a fine might let in the incumbrances of the ancestors as well as those of the cognizors. In some instances, however, a fine is preferable to a recovery, as the former is *an estoppel* by the statute, where a recovery would not estop.

Pig. Recov. 32 - 34 - 55. 2 *Cru.* 271. *Plowd.* 515.

A recovery may be suffered by a tenant in fee-simple in order to strengthen the title. So, as it is a suit in the progress of which a feme covert is secretly examined, it will bar her of her claim to dower.(*a*)

Plowd. 514. Fare *v.* Snow.

(*a*) In an anonymous case in 11 *Mod.* 121., it is said to have been holden, that if a tenant in tail levies a fine, he is for ever hindered from suffering a recovery to destroy the remainder in fee, "because the fine has turned the estate tail into a base fee, and determined all privity of estate existing between him and the remainder-man, who could not now be vouched over, unless he voluntarily consented to it." The law on this point is taken to be otherwise (*ante*, p. 325.), clearly, if the use on the fine be declared to a stranger; but if it be declared in favour of the tenant in tail, then the want of privity between him and the remainder-man, as above noticed, seems to present an impediment to his suffering a recovery while he is seised in respect of the base fee. If he dies leaving the base fee to descend to his general heir, and the heir under the entail is a different person, then that heir may suffer a recovery; but the above case, with some shew of principle, throws a doubt at least on the question, whether a tenant in tail, having levied a fine and taken back a base fee, can himself suffer a recovery afterwards. If the tenant in tail and remainder-man in fee join in a fine, then

the base fee becomes merged in the reversion, and a recovery cannot, it is apprehended, be afterwards levied: for although the use results to the parties to the fine according to their former ownership, yet the tenant in tail takes back a base or determinable fee by original limitation, arising out of the amalgamated seisin of the estate tail and remainder; and it is settled, that the tenant of a determinable fee cannot suffer a recovery. *Pig.* 129. 1 *Mod.* 111.

OF STATUTES

AS THEY RELATE TO CONVEYANCES.

CHARTER of *Hen.* I., *A. D.* 1101.—Under the feudal law all lands were inalienable; but about the latter end of the reign of *William Rufus* this doctrine began to be relaxed, and lands were allowed to be aliened with the consent of the lord and the next heir. By the above Charter, the feudatory was expressly enabled to alien without the consent of any other person such lands as he had purchased himself; but this express provision did not take away the common law power of aliening lands derived by descent with the concurrence of the lord and heir. At this time the tenant had little more than the *usufruct* of the land, and therefore it was common to express in feoffments, that the lands were holden of the chief lord of the fee, and that the feoffment was made with the consent of the feoffor's heir. A copy of this Charter is given in *Blackstone's Tracts*, p. 286. *Charter Hen.* I.

Magna Charta, 17 *John*, *A. D.* 1215.—This famous statute made little alteration in the power of aliening feuds, except that it allowed one fourth part of the lands taken by descent to be aliened without consent of the heir. It, however, established the widow's right to dower as it now stands, *Magna Charta.*

(*Litt.* 36.), and exempted lands from crown debts when the goods of the debtor were sufficient to answer the debt.

Char. Foresta. Charta de Foresta, 9 *Hen.* 3., *A. D.* 1224.—Although by the feudal law lands were not allowed to be aliened, yet the King's tenants enjoyed the power of subinfeudation, which was nearly equivalent to a power of alienation. The proprietor of a feud granted a portion of the land to another person, to be held of himself, thus creating a tenancy, and yet not severing the land from the feud, for as between himself and the King the ancient services were due. This practice was soon followed by the sub-tenants, who aliened the greatest portion of their lands, and thereby rendered themselves incapable of yielding to the lord his services. The great lords perceiving that they thus lost their feudal profits, procured a clause to be inserted in the *Charta de Foresta*, whereby it was provided, that "no freeman from henceforth shall give or sell any more of his land, but so that of the residue of the lands the lord of the fee may have the service due to him, which belongeth to the fee." See a comment on this clause, 2 *Inst.* 64.

Merton. Stat. of Merton, 20 *Hen.* 3., *A. D.* 1236.—This statute was passed in a convent of Augustine canons, situate at Merton, about seven miles from London, whence it derives its name. By this stat. it is provided that tenants in dower shall be entitled to emblements; that lords of manors may inclose their wastes, provided they leave enough common for their tenants; and that infant heirs shall not be compellable to marry against their consent.

Marlbridge. Statute of Marlbridge, (or Marlborough, in Wiltshire), 52 *Hen.* 3., *A. D.* 1267.—By the common law, lessees for years and life could commit waste with impunity. By this statute it is declared that, they shall "yield full damage for the waste committed, and be punished by amerciament grievously." 2 *Inst.* 145.

Stat. de Westminster primer, 3 *Edw.* 1., *A. D.* 1276.— By this statute the time of memory is limited to the reign of King Richard the first, July 6, 1189. This provision is now seldom resorted to, except as a limit to the admission of evidence in tithe suits and claims of prescriptive right. *Westm. 1st.*

Stat. of Gloucester, 5 *Edw.* 1., *A. D.* 1278.—The remedy for waste given by the statute of *Hen.* 3. being found inadequate to the loss sustained, this statute enacted that the place wasted should be recovered, together with *treble damages*, as an equivalent for the injury done to the inheritance. *Harrow School* v. *Anderton*, 2 *Bos.* & *Pul.* 86. *Gibson* v. *Wells*, 1 *New. Rep.* 290. *Gloucester.*

Stat. of Acton Burnel, 11 *Edw.* 1., *A. D.* 1283.—By the common law the lands of a debtor could not as against *himself* be taken in execution in an action of debt, but as against his *heir* they might. As commerce increased the inconvenience of this doctrine was felt, and about the 11th of *Edw. I.* the stat. *de mercatoribus* was passed at Acton-Burnel, a castle belonging to the family of Burnell, in Shropshire, whereby it was enacted, that the chattels and *devisable burgages* of the debtor might be sold for the payment of his debts.—At this time lands were not generally devisable; but by the local customs of certain borough towns, the lands and tenements within their respective precincts were allowed to be passed by will, and these by the above statute are made amenable to debts. *Acton Burnel.*

Stat. de Donis, 13 *Edw.* 1., *A. D.* 1286.—At the date of this statute a gift to a man and the heirs of his body provided that if he had no heirs the land to revert, was construed to give the donee a conditional fee, which enabled him, after issue begotten, to *alien* the land, and thereby to disinherit the issue and to deprive the donor of his right of reverter. This interpretation is declared by the statute *de donis* to be " con- *De Donis.*

De Donis. trary to the minds of the givers, and the form expressed in the gift;" wherefore it is ordained, that "the will of the giver, according to the form in the deed of gift manifestly expressed, be henceforth observed; so that they to whom the land is given under such condition shall have no power to alien the land so given, but that it shall remain unto the issue of them to whom it is given after their death, or shall revert unto the giver or his heirs, if issue fail or there is no issue at all. And if a fine be levied hereafter upon lands so given it shall be void in the law." A new writ is then provided for what the statute calls a "new case," which writ is called a *formedon*, from the object of it being to enforce the *form* of the gift.

Westm. 2d.—Elegit. Stat. of Westminster 2d., 13 *Edw.* 1. c. 18., *A. D.* 1286.—By this statute is declared, "that when a debt is recovered, or acknowledged, or damages adjudged in the king's courts, the plaintiff shall have his election either to have a writ of *fieri facias*, or else that the sheriff shall deliver to him all the chattels of the debtor, saving only his oxen and beasts of the plough, and also *one half of his lands*, until the debt be levied upon a reasonable price or extent." On this statute was framed the writ of *elegit*, so called because the creditor elects to take his remedy on the lands.

From the word *acknowledged* in this statute has sprung the powerful security by *warrant of attorney*, which is an authority from the debtor addressed to one or more attornies of some court at Westminster, authorizing him or them to acknowledge a judgment as for money lent or a debt due, which enables the creditor to sue out a writ of *elegit* as effectually as if the judgment had been obtained in an adversary suit. In a modern case, Lord Kenyon said, he saw no difference between a judgment that was obtained in consequence of an action resisted, and a judgment signed under a warrant of attorney, since the latter was only to shorten the process and lessen the expense of the proceedings. *Doe* v. *Carter*, 8 *T. R.* 57. *Et vide Sampson* v. *Goode*, 2 *Burn. & Ald.* 568. The sheriff, however, does not deliver actual

possession on a writ of *elegit*, but only legal seisin, and the creditor is left to his action of ejectment to obtain actual possession of the land; on judgment in that ejectment a writ of possession issues, and a jury is impannelled to ascertain the moiety delivered by the sheriff. Hence it has been suggested that a warrant of attorney to confess a judgment in ejectment is a proper accompaniment to a mortgage, as it shortens the process of recovering possession when the interest becomes in arrear, and at the same time assists in keeping the mortgagor punctual to his engagements—the only inconvenience attend- *Elegit.*

Stat. of Quia Emptores, 18 *Edw.* 1. *st.* 1. *c.* 1., *A. D.* 1290.—Prior to this statute any person might by a grant of land have created a tenure as of his person: but if no such tenure were reserved the feoffee held of the feoffor by the same services by which the feoffor held of his superior lord. The consequence was that all the fruits of tenure fell into the hands of the feoffors or mesne lords to the prejudice of the superior lords of the fee; for remedy whereof, it was by this statute enacted, "That from henceforth it shall be lawful to every freeman to sell at his own pleasure his lands and tenements, or part of them, so that the feoffee shall hold the same lands or tenements of the chief lord of the same fee, by such service and customs as his feoffor held before." *Quia Emptores.*

It will be observed that this act relates only to conveyances in fee. If then a tenant in fee aliens to one for life, with remainder to another in tail, allowing the reversion to devolve upon himself, the tenant for life and tenant in tail still hold of the donor, who holds of the superior lord. Consequently if an estate be given to a man and his heirs for the life of another person, and the grantee dies without heirs, the estate should escheat to the grantor and not to the superior lord. The doctrine of escheat, however, is scarcely applicable to a descendible freehold, and the statute of Frauds provides, that if there be no special occupant the *estate pur autcr vie* shall

Quia Emptores. go to the executors or administrators of the deceased tenant. Whether the words "no special occupant" embrace the case here supposed, is a point not now material to consider. Escheat arises in respect of the seignory, and this statute has reduced all subinfeudations to the original tenure of the chief lord of the fee. Since its date all lands must have changed owners, and on the first change of ownership the lands ceased to be holden of the feudist, and became again tributary to the lord. Manors no doubt were coeval with parishes, the one being a division peculiar to the clergy, and the other consisting of the domains of the great lay-lords. The boundaries of these domains could not at first have been so accurately defined as the boundaries of parishes, because they were in some measure dependant on the wealth or poverty of the owners. But manors appear to have been established nearly as they now exist at the time of the Norman Conquest; and although a tenure might have been created prior to this statute, it is apprehended that a manor could not have been then created by act of the party, for a manor, according to *Perkins, s.* 670. must consist of demesnes and services, and the latter can only arise by immemorial usage, see also 2 *Black. Com.* 89. 1 *Watk. Cop.* 5. 17. 4*th ed.* At this day all freehold lands within a manor are holden of the lord of that manor to whom they return in case of the tenant's death without heirs, 12 *East.* 102, *et infra* 54 *Geo.* 3.

An exposition of this statute is given in 2 *Inst.* 500. *et vide Bradshaw* v. *Lawson,* 4 *T. R.* 443. 2 *ib.* 424. *Doe* v. *Huntingdon,* 4 *East.* 271. 2 *Maul. & Selw.* 175. On the discovery of America the territory of Virginia was granted to a company of adventurers "to be holden of the manor of East Greenwich in fee and common socage, paying in lieu of all services one fifth of the gold and silver that should be found." See also the stat. 54 *Geo.* 3. *infra,* as to cases in which corruption of blood is now taken away.

1 Rich. 3d.—Uses. Stat. 1 *Rich. 3d. c.* 1., *A. D.* 1483.—At the date of this

statute if a feoffment were made to *A.* to the use of *B.*, *A.* took the legal estate and *B.* took a trust or confidence in equity, *A.* was called the feoffee to uses and *B.* the *cestui que use*. The *cestui que use* however was the real beneficial owner and the feoffee was merely a trustee. The *cestui que use* being in possession, frequently aliened the lands, and afterwards the feoffee entered, which gave rise to several vexatious suits in Chancery; to remedy this inconvenience, the above statute gave the *cestui que use* in possession a power of aliening the legal estate by feoffment or other legal assurance without the consent or concurrence of the feoffees. The statute of Uses, 27 *Hen.* 8. has in effect repealed this act of Richard by conveying the estate of the feoffee to the *cestui que use* immediately on its creation, thereby effectually depriving the feoffee of all power of molestation. Mr. J. Lawrence, however, still treats the statute as existing, 7 *T. R.* 47. 8 *ib.* 494.; but Mr. Sugden has shewn that it has not now any operation whatever; *Gilb. U.* 67. *et vide* 1 *Sand. Uses* 23. 4*th Ed.* *1 Rich. 3.—Uses.*

Stat. of Fines, 4 *Hen.* 7. *cap.* 24., *A. D.* 1489.—By this statute, after reciting that fines were essential to avoid strifes and debates, it is enacted, that every fine levied in the Court of Common Pleas of any lands tenements or other hereditaments, shall be openly read and proclaimed in Court the same term, and in three terms next following, four days in every term, and that such proclamations being so made, such fine shall be final and conclude as well privies as strangers to the same, except women covert (other than parties to such fine), and every person within the age of twenty-one years, in prison, or out of the realm, or not of whole mind at the time of such fine levied, not being parties to such fine. Saving to every person and their heirs, other than such parties, such right as they have to such lands, &c. at the time of such fine ingrossed, so that they pursue their title by action or entry *within five years* after the said proclamations made or their respective rights accrued. By the stat. 31 *Eliz.* c. 2. fines are de- *Fines.*

Fines. clared to be good although they are proclaimed only once in each term instead of four times.

In the next reign, by an act to explain the foregoing statute, it was enacted, that all fines levied before the Justices of the Common Pleas, with proclamations according to the statute 4 *Hen.* 7. *c.* 24., by persons of full age, of any lands tenements or hereditaments entailed to the persons levying the same, or to any ancestor of the same person, in possession, remainder, reversion, or in use, shall, after such fine levied, ingrossed, and proclaimed, be a bar against such persons and their heirs, claiming the said lands by force of such entail, and against all other persons claiming such lands to their use, or to the use of any heir of the bodies of them. This act is not to extend to entails in wives of the gift or procuration of their husbands, nor to entails of the gift of the crown whereof the reversion at the time of levying such fine shall be in his Majesty. 32 *Hen.* 8. *c.* 36.

Jointures. Stat. of Jointures, 11 *Hen.* 7. *c.* 20., *A. D.* 1495.---If any woman having any estate in dower, or for term of life, or in tail jointly with her husband, or only to herself or to her use, in any manors, lands, tenements, or hereditaments *of the inheritance or purchase of her husband*, or given to the husband and wife in tail or for life by any of the *ancestors of the husband*, or by any other person seised to the use of *the husband or of his ancestors*, shall, being sole or with any after-taken husband, discontinue, alien, release, or confirm with warranty, or by covin suffer any recovery of the same, all such recoveries, discontinuances, &c. shall be void; and the person next entitled to the inheritance after the woman's decease, may enter as if no such discontinuance, &c. had been made, s. 1.

If any of such after-taken husbands and women, or any seised to their use, shall do make or suffer any such discontinuance, recoveries, &c., the heir in tail or person entitled to the inheritance after the woman's decease, may enter on and

enjoy such lands, &c. as against such husband during his life, according to their respective interests as if such women had been dead; provided such women, after the decease of their husbands, may re-enter and enjoy the same lands according to their first estate therein, s. 2. *Jointures.*

If such woman at the time of such discontinuance recoveries, &c. be sole, then she shall be barred of all interest in such lands, &c., and the person next entitled to an estate of inheritance therein after her decease may enter and enjoy the same according to his title, s. 3.

This act shall not extend to any recovery or discontinuance in which the heir next inheritable to such woman, or where the reversioner next after the death of such woman, is consenting to the same, s. 5.

Every such woman after the death of her first husband may give, sell, or make discontinuance of any such lands for term of her life only, s. 6. For an exposition of this stat. see *Gilb. U.* 339. *Cov. Rec.* 213.

Stat. of Executors, 21 *Hen.* 8. *c.* 4., *A. D.* 1592.—This statute recites, that land devised to be sold by divers executors, cannot by common law be sold by part of them; wherefore it is enacted, that where part of the executors named in any will directing lands, tenements, or other hereditaments, to be sold by them after the testator's death, refuse to administer, and the residue of the executors take on them the charge of the will, then all bargains and sales of such lands, &c. made by the latter only, shall be as effectual as if all the executors had joined in making the bargain and sale. *Executors.*

At the date of this act lands were only devisable in particular places; but feoffments to such uses as the feoffors should appoint enabled the owners of land to declare the uses by a testamentary writing, and these declarations of use were the wills alluded to by the statute, and therefore it may be supposed that this act was rendered nugatory by the statute of wills. By construction however this statute has been held to apply to devises at this day, and to embrace not only a

Executors. power but an absolute devise of the legal estate to the executors to sell. *Bonifant* v. *Greenfield*, *Cro. Eliz.* 80. See *Bro. Devise*, pl. 3.; and *Hawkins* v. *Kemp*, 3 *East.* 410. The devise must be to the persons as *executors;* or at least the fund when raised must be distributable by them in that character. A mere devise to persons to sell, and afterwards an appointment of them as executors, will not, it is said, bring the case within the act. *Sug. Gilb. U.* 138. See further on this stat. *Sug. V. & P.* 387. *Sug. Pow.* 140. 1 *Pow. Mortg.* 248 a. and the late case of *Tylden* v. *Hyde*, *ante*, p. 229.

Uses. Stat. of Uses, 27 *Hen.* 8. *c.* 10., *A. D.* 1535.—This famous statute is treated of *ante*, p. 207. of this edition. Besides its peculiar operation in reference to uses, it enacts, *Jointures.* that where a woman has a jointure, she shall not be entitled to her dower also; but if she be evicted of her jointure, her dower shall revive; and that if the jointure be made after marriage, she shall have her election when the coverture has ceased to have either her dower or her jointure, but not both.

Enrolment. Stat. of Enrolments, 27 *Hen.* 8 *c.* 16., *A. D.* 1536.—This statute is also treated of *ante*, pp. 301, 302, & 305.

Partition. Stat. of Partition, 31 *Hen.* 8. *c.* 1., *A. D.* 1539.—Be it enacted, that all joint-tenants and tenants in common of any estate of inheritance in their own right, or in the right of their wives, be compelled to make partition between them, in like manner as coparceners by the common law are compellable to do. This statute relates to estates of inheritance only. By a stat. of the next year, joint-tenants and tenants in common for *lives or years* are declared compellable to make partition in the same way.

Wills. Stat. of Wills, 32 *Hen.* 8. *c.* 1., *A. D.* 1540.—By this statute it is enacted, that all persons having any manors, lands, tenements, or hereditaments, holden in socage or of the na-

ture of socage tenure, shall thereafter have full and free liberty, power, and authority to give, dispose, will, and devise the same, as well by his last will and testament in writing as by any act or acts lawfully executed in his life, at his free will and pleasure. In confirmation of this stat. it was enacted by the 34 and 35 *Hen.* 8., that all and singular person and persons having a sole estate or interest in fee-simple, or seised in fee-simple in coparcenary or in common, of and in any manors, lands, tenements, rents, or other hereditaments, in possession, reversion, or remainder, or of rents or services incident to any reversion or remainder, shall have full and free liberty, power, and authority to give, dispose, will, or devise the same to any person or persons *(except bodies politic and corporate)*, by his last will and testament in writing, at his and their own free will and pleasure. *Wills.*

The Enabling Statute of 32 *Hen.* 8. *c.* 28., *A. D.* 1540.—By the common law all persons may make leases to endure as long as their interest in the land continues, but no longer. This statute enabled a tenant in tail to make a lease for three lives or twenty-one years, to bind his issue. Secondly, a husband seised in right of his wife in fee-simple or fee-tail, to make a similar lease to bind his wife and her heirs, provided she joins therein. Thirdly, ecclesiastical persons seised of an estate of fee-simple in right of their churches (not parsons or vicars who are seised for life only), to make leases to bind their successors. But certain requisites must be observed in making those leases, for which see 2 *Black. Com.* 319. As to the clause saving the wife's entry in this statute, see *ante* p. 320, and for other enabling statutes see 55 *Geo.* 3. *c.* 147. 56 *Geo.* 3. *c.* 52. 56 *Geo.* 3. *c.* 141. 39 & 40 *Geo.* 3. *c.* 41. by which latter act ecclesiastical lands may be let in parts so that the aggregate rents amount to the old reservation, *et vide* on this subject, 8 *Co.* 69. *Cro. Car.* 22. 4 *Cru.* 71. 3*d ed.* 3 *Pow. Mortg.* 383., *Enabling Stat. —Leases.*

Stat. of Reversions, 32 *Hen.* 8. *c.* 34., *A. D.* 1540.—By the common law if a man let land to another for life, by inden- *Reversions. Conditions.*

Reversions. Conditions. ture, rendering rent, with a condition of re-entry in default of payment, if afterwards the lessor granted the reversion to a stranger, and the tenant for life attorned, such grantee could not take advantage of the condition as the lessor or his heirs might have done if the reversion had continued in him. But now by the above statute, grantees of reversions, and privies in estate, are enabled to take advantage of the breach of conditions and covenants against the lessees the same as the lessors or grantors might have done; and by sect. 2. lessees may have the like remedies against the grantees of the reversions which they might have had against their grantors. For an exposition of this statute, see *Co. Litt.* 215 a.

Recoveries. Stat. of Recoveries, 34 & 35 *Hen.* 8. c. 20., *A. D.* 1543.—This statute is noticed, *ante* p. 192. As to the operation of fines on estates tail of the gift of the crown, see *ante* stat. for the exposition of fines, *ante* 316.

Disabling stat. Disabling statutes,—1 *Eliz.* c. 19. 13 *Eliz.* c. 10. 14 *Eliz.* c. 11. 18 *Eliz.* c. 11. 43 *Eliz.* c. 29. 17 *Geo.* 3. c. 53. 21 *Geo.* 3. c. 66. 39, 40 *Geo.* 3. c. 41. 48 *Geo.* 3. c. 84. 53 *Geo.* 3. c. 141. 55 *Geo.* 3. c. 147. 57 *Geo.* 3. c. 99.—These statutes regulate the power of alienation between ecclesiastical persons in possession and their successors. They are two voluminous for insertion here. The subject of them is in part discussed in *Cov. Mortg. Prec.* 285., particularly with reference to the power of a rector to charge his living.

Fraudulent Conveyances Stat. of Fraudulent Conveyances, 13 *Eliz.* c. 5., *A. D.* 1570., made perpetual by 29 *Eliz.* c. 5.—This statute enacts that every conveyance of lands, hereditaments, goods, and chattels, or of any lease, rent, common or other profit or charge, out of lands, &c. by writing or otherwise, and every bond, suit, judgment, and execution, to be had or made *with the intent to defraud creditors* or others of their actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs, shall be deemed (only as against

that person, his heirs, executors, administrators and assigns, whose actions, &c. are or shall be any way disurbed, delayed, or defrauded,) to be utterly void. And by the 27 *Eliz.* c. 4. § 2. made perpetual by the statute 30 *Eliz.* c. 18. it is enacted that every conveyance of lands, tenements, or other hereditaments whatsoever, had or made *with the intent and purpose to defraud* and deceive any person or persons, bodies politic or corporate, who shall purchase the same, shall be deemed and taken, (only as against that person or persons, body politic or corporate, his and their heirs, successors, executors, administrators, and assigns,) to be utterly void, frustrate, and of none effect. *Fraudulent Conveyances.*

The deeds which are rendered void by these statutes are of two sorts :—1. Deeds made with an express intent to defraud creditors or subsequent purchasers. 2. Deeds made upon good but not valuable considerations; which are usually called voluntary conveyances. These statutes have been very prolific in litigation, and the cases upon them are both numerous and complicated. They are collected and treated of with great ability by Mr. Roberts in his Essay on Fraudulent Conveyances; and by Mr. Atherly in his Treatise on Settlements.

Stat. of Recoveries, 14 *Eliz.* c. 8., *A. D.* 1572.—After reciting that tenants in tail after possibility of issue extinct, and other tenants for life or lives, had suffered common recoveries to the prejudice of those in remainder or reversion, it is enacted, that all such recoveries had or prosecuted by covin, against any such particular tenant, or against any other with voucher over of such particular tenant, shall as against all persons in remainder or reversion be utterly void, provided that that act shall not extend to recoveries by good title, or to recoveries by assent and agreement of the persons in remainder or reversion, so that such assent appear of record in any of her Majesty's Courts. *Recoveries by tenant for life.*

Tenants for life are thus enabled to join in recoveries

without forfeiting their estates, *et vide* 3 *Taunt.* 373. As to errors in fines and recoveries see 23 *Eliz. c.* 3. 27 *Eliz. c.* 9. 31 *Eliz. c.* 2. 32 *Geo.* 2. *c.* 16.

Limitations.

Stat. of Limitations, 21 *Jac.* 1. *c.* 16., *A. D.* 1623.—For quieting of men's estates and avoiding suits be it enacted, that no person shall hereafter make any entry into any lands, tenements, or hereditaments, but within twenty years next after his or their right or title shall first descend or accrue to the same; except infants, *femes covert*, *persons non compos mentis*, imprisoned, or beyond the seas, who shall have ten years next after his and their full age, discoverture, coming of sound mind, enlargement out of prison, or coming into this realm, to make their entry or claim in.

In applying this statute to a case in practice, the principal object is to ascertain the precise period when the possession becomes adverse, for from that time only the twenty years begin to run; and it is to be remembered that each successive owner in remainder has twenty years to assert his title in from the time the remainder falls into possession; but when the twenty years have once commenced they continue to run on, although disabilities intervene. The Court of Chancery in analogy to the statute of limitations, has adopted the period of twenty years within which all equitable rights and interests are held barred, as stated *ante* p. 201. At law, however, the old remedies by real action, not having been expressly abolished, the periods of limitation to such actions are necessary to be referred to. A writ of right, which is the final remedy, must be brought within sixty years from the time when the right first accrued, and within thirty years if the claimant were himself living at the time when the right first commenced. 32 *Hen.* 8. *c.* 1. A writ of entry *sur abatement*, *intrusion*, *disseissin*, &c. may be brought within fifty years on an ancestral seisin, and within thirty years on a personal seisin, 32 *Hen.* 8. *c.* 2. *s.* 3. In a late case it was held that in a writ of entry *sur intrusion*, the fifty years al-

lowed by this statute must be accounted from the seisin of the person who created the particular estate for life, and not from the death of the tenant for life, or the commencement of the adverse possession. *Romilly* v. *James*, 6 *Taunt.* 263. 1 *Marsh.* 532. *et vide Widdowson* v. *Earl of Harrington*, 1 *Jac. & Walk.* 557. *Limitations.*

The peculiar remedy of a tenant in tail is by writ of formedon, but he may bring an ejectment to get into possession. By stat. 32 *Hen.* 8. *c.* 2. formedons were to be sued within fifty years after the cause of action fallen. But now by the stat. 21 *Jac.* 1. *c.* 15. it is enacted "that all writs of formedon in descender, remainder, and reverter, shall be barred by twenty years nonclaim of persons having title thereto, sect. 1. On the construction of this clause, see *Cotterell* v. *Dutton*, 4 *Taunt.* 826. *Tolson* v. *Kaye*, 3 *Brod. & Bing.* 217. *Doe* v. *Jesson*, 6 *East* 84. *Hunt* v. *Bourne*, 2 *Salk.* 422. *Lutw.* 781. *Com. Rep.* 124. 1 *Bro. Parl. C.* 53.

By statute 10 & 11 *Wm.* 3. *c.* 14. no fine, recovery, or judgment in any action real or personal shall be reversed *for any error* therein, unless the writ of error be sued within *twenty years* after such fine levied, recovery suffered, or judgment signed, with an extension of five years further in cases of disability, *et vide Lloyd* v. *Vaughan*, 2 *Stra.* 1257. Suits instituted by the crown are limited by statute 9 *Geo.* 3. *c.* 16. to sixty years.

Stat. Abolishing Tenures, 12 *Car.* 2., *A. D.* 1660.—By this statute it is enacted, that all tenures by knight's service, held of the king or others, and the fruits and consequents thereof be henceforth taken away and discharged, and that all tenures of every sort be turned into free and common socage, save only tenures in frankalmoign, copyholds, and the honorary services of grand serjeanty; and that all tenures which shall be created by the king, his heirs, or successors in future shall be held in free and common socage. But it is declared, that the act shall not take away any rent heriot or suit of court incident to any tenure altered by that act or *Abolition of tenures.*

other services incident or belonging to tenure in common socage or the fealty or distresses incident thereto, sect 5.

Guardians. It is also enacted, sect. 8., that the father, although under twenty-one, may by deed or will attested by two witnesses, appoint who shall be guardians of his children after his decease, until they attain twenty-one, or for any less period, in exclusion of the mother by nature and of the next of blood by socage.

The testamentary guardian has the custody not only of the lands and goods descended or left by the father, but of all lands and goods any way acquired or purchased by the infant, which the guardian in socage had not. *Vaugh.* 185, 186. 2 *Fonbl. Treat. Equity*, 225. *5th ed., et vide* 2 *Byth. Prec.* 399.

Life Estates. Stat. of Life Estates, 13 *Car.* 2. *c.* 6. *s.* 2., *A. D.* 1661.—It is enacted by this stat., that if any person for whose life an estate is granted shall go abroad, and in any action commenced for the recovery of the lands by the lessors or reversioners, there shall be no sufficient proof that such person is alive, the judge shall direct the jury to give their verdict as if the person so remaining abroad were dead; and by the stat. 6 *Ann. c.* 18. it is provided, that the remainder-man and reversioner may once a-year apply to the Lord Chancellor, on affidavit, for an order to have any person on whose life his remainder or reversion is expectant, produced to such persons (not exceeding two) as shall in such order be named by the party petitioning; and on non-production of such person, the remainder-man or reversioner shall be at liberty to enter upon the estate as if such tenant for life were dead. But if the tenant for life afterwards appears he may re-enter.

Distributions. Stat. of Distributions, 22 & 23 *Car.* 2. *c.* 10., *A. D.* 1670.—This statute is explained by *Lovelass*, *Toller*, and *Mascall*. Not being within the province of this Epitome, it is sufficient to give its date merely.

Stat. of Frauds and perjuries, 29 *Car.* 2. c. 3., *A. D.* 1677.—For prevention of many fraudulent practices and perjury, be it enacted, *Frauds*

That from henceforth all leases, estates, interests of freeholds or terms of years, or any uncertain interest of in to or out of any messuages manors lands tenements or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates to the contrary notwithstanding. *s.* 1. *All agreements respecting land to be in writing.*

Except nevertheless all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount unto two third parts at the least of the value of the thing demised. *s.* 2. *Except leases not exceeding three years.*

And moreover, That no leases estates or interests, either of freehold or terms of years or any uncertain interest, not being copyhold or customary interest, of in to or out of any messuages manors lands tenements or hereditaments, shall at any time hereafter be assigned granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning granting or surrendering the same or their agents, thereunto lawfully authorized by writing or by act and operation of law. *s.* 3. *Assignments and surrenders to be in writing.*

And be it further enacted, That from henceforth no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt default or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands tenements or hereditaments, or any interest in or concerning them; *All contracts to be in writing.*

or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. *s.* 4.

All devises to be in writing and signed in the presence of three witnesses.

And be it further enacted, That from henceforth all devises and bequests of any lands or tenements devisable either by force of the statute of wills or by this statute, or by force of the custom of *Kent*, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void, and of none effect. *s.* 5.

Revocation of devises.

And, moreover, No devise shall be revocable otherwise than by some other will or codicil, or by burning, tearing, cancelling, or obliterating the same by the testator himself, or in his presence and by his directions and consent. *s.* 6.

All declarations of trust to be in writing.

And be it further enacted, That all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void, and of none effect. *s.* 7.

Trusts by implication.

By sect. 8., trusts arising by implication of law are excepted, but all assignments of trusts must be in writing.

Debts of cestui que trust.

By sect. 10, it is declared, that lands, tenements, rectories, tithes, rents, and hereditaments, in the hands of trustees, may be taken in execution for debts recovered against the *cestui que trust*, but that such lands shall be held free from the incumbrances of the trustee; And trusts are declared *assets* in the hands of the heirs of the *cestui que trust*, but no heir by reason thereof is to become chargeable in respect of his *own* estate. *s.* 11.

Estate pur auter vie.

And be it further enacted, That from henceforth any es-

tate *pur auter vie* shall be devisable by a will in writing, signed by the party so devising the same or by some other person in his presence and by his express directions, attested and subscribed in the presence of the devisor by three or more witnesses; and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy, as assets by descent, as in case of lands in fee-simple; and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands. *s.* 12.

Personal engagements above 10l. to be in writing.

And be it further enacted, That from henceforth no contract for the sale of any goods, wares, or merchandizes, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized. *s.* 13.

The statute then relates to nuncupative wills.

Fraudulent devises.

Stat. of Fraudulent Devises, 3 *W. & M. c.* 14, *A. D.* 1691. — Prior to the passing of this act, if a debtor died seised of real estate, and by his will devised them away from his heir, the creditor could not follow them in the hands of the devisee; and in the hands of the heir real assets were only available in case the creditor were expeditious enough to commence his action before the heir had disposed of them. To remedy the inconveniences arising from this state of the law, it was by the above statute enacted,

That all wills and testaments, if any, of lands, tenements, or hereditaments, or of any rent, profit, term, or charge thereout, shall be deemed (only as against creditors by bond or specialty in which the heirs are bound, their heirs, executors, administrators, and assigns) to be fraudulent and absolutely

Fraudulent Devises.

void; provided that all devises for payment of just debts, or portions for children, pursuant to articles made before marriage, shall be of full force: But if any heir receiving lands by descent from an ancestor indebted by bond or specialty, shall sell the same before action brought, he shall be answerable for his ancestor's debt out of his own goods and chattels to the value of the land so sold, (in which case the preference of creditors is to be the same as in actions against executors and administrators)—saving that lands *bonâ fide* aliened before action brought, shall not be liable to such execution; And it is provided that all devisees made liable by this act, shall be liable in the same manner as the heir at law by force of this act is, notwithstanding the lands to them devised are aliened before action brought.

It has lately been determined, that an action of *covenant* is not within the purview of this statute. If therefore a person sells an estate and enters into *covenants for title* and dies, leaving other lands to descend to his heir, or devises them to *A. B.*, the heir having aliened before action brought, and the devisee at all times is free from an action for a breach of the covenants for title. *Wilson* v. *Knubley*, 7 *East* 128.

The old conveyancers seem to have taken a similar view of this statute, for they invariably required a *bond* for the performance of covenants, in order that an action might have been substantiated against the devisee and heir selling before action brought, if a discovery of the defects in the title occurred after the seller's decease.*

Clandestine Mortgages.

Stat. of Clandestine Mortgages, 4 & 5 *Wm. & Mary*, c. 16., *A. D.* 1692.—If any person having once mortgaged his lands for a valuable consideration shall again mortgage the same lands, or any part thereof to any person, the former mortgage being in force, and shall not discover in writing to the second mortgagee the first mortgage, such mortgagor so again mortgaging his lands, shall have no relief or equity of redemption against the second mortgagee. But this act is not to bar any

widow of dower who does not legally join her husband in such second mortgage.

Stat. of Mortmain, 7 & 8 *Wm.* 3. *c.* 37., *A. D.* 1696.— By the statute *de religiosis*, 7 *Edw.* 1., it is declared that no person shall "presume to buy or sell, or by any device to appropriate lands, (under pain of forfeiture of the same) whereby such lands may come into mortmain." The effect of this statute was to prohibit all alienations to corporate bodies. By the above statute of *Wm.* 3. it is made lawful for the king, his heirs and successors, to grant to any person or persons, bodies politic or corporate, their heirs and successors, *licences* to alien in mortmain, and also to purchase, acquire, take, and hold in mortmain, in perpetuity or otherwise, any lands, tenements, rents, or hereditaments whatsoever. By a subsequent statute (9 *Geo.* 2. *infra*), alienations to *charitable uses* are allowed under certain regulations. *Mortmain.*

Posthumous Children, 10 & 11 *Wm.* 3. *c.* 16., *A. D.* 1699.— By this act posthumous children born after the decease of the father, are declared entitled to take estates as if they were born in his lifetime, although there be no limitation to trustees to support the contingent uses to such children. *Posthumous Children.*

Registry Acts, 2 & 3 *Anne*, *c.* 4., *A. D.* 1703. 5 *Anne*, *c.* 18. 6 *Anne*, *c.* 35. 7 *Anne*, *c.* 20. 8 *Geo.* 2. *c.* 6.—By these statutes it is provided, that all deeds, wills, and documents of every description, concerning or affecting any hereditaments in Middlesex, York, or Kingston-upon-Hull, shall be registered in offices established for that purpose in the counties and town above-mentioned. In these statutes copyhold estates, leases at rack-rent, and leases for twenty-one years, where the actual possession accompanies the lease, as also chambers in Serjeant's Inn, the Inns of Court and Chancery, are excepted; and it is declared, that no judgment, statute, or recognizance, shall take effect but from the time of registry. For an exposition of these statutes, see *Rigge* *Registry Acts.*

on Registration, Sug. V. & P. 662. 2 *Pow. Mortg.* 622 a. 627 a. 2 *Watk. Cop.* 155. *4th ed.*

Advowsons.

Stat. of Advowsons, 7 *Ann. c.* 18., *A. D.* 1708.—By this act it is declared, that no usurpation shall displace the estate of the patron; and that if coparceners, joint-tenants, and tenants in common, are seised of an advowson, and a partition is made to present by turns, each shall be seised of a separate estate to present accordingly.

By stat. 12 *Anne, s.* 2. *c.* 12., clergymen are prohibited from purchasing the next avoidance or presentation of any ecclesiastical benefice, so as to be presented and collated thereupon *themselves*. The words of the act are very extensive, but they are generally taken with a less signification than they import. For an exposition of this statute and the subject in general, see *Mirch. on Advowsons.*

Infants.

The statute of 7 *Anne, c.* 19., *A. D.* 1708, relative to infants, has been repealed, but its provisions are re-enacted by the *6th Geo.* 4. *c.* 74. *infra.*

Copyholds.

Stat. of Copyholds, 9 *Geo.* 1. c. 29., *A. D.* 1722.—This statute enables *femes covert* and infants to be admitted to copyhold lands by their attornies or guardians.

Lunatics.

Statute concerning Lunatics, 4 *Geo.* 2. *c.* 10., *A. D.* 1731. —This statute has been repealed by the 6 *Geo.* 4. *c.* 74. *infra.*

Tenant holding over.

Stats. concerning Land. and Ten. 4 *Geo.* 2. *c.* 28., *A. D.* 1734.—Where any tenant holds over after demand made, and notice in writing given by the landlord for delivering the possession [notice to quit in writing being a sufficient notice within this stat., 2 *Black. Rep.* 1074.]; such persons so holding over shall pay *double the yearly value* of the lands so detained, for so long time as the same are detained, to be recovered by action of debt; against the

recovering of which penalty there shall be no relief in equity. *Land. & Ten.*

This act also declares that on half a year's rent becoming in arrear the landlord may commence his ejectment without any formal demand or re-entry, but he is not to recover against a mortgagee of the lease if within six months such mortgagee pays the rent and afterwards duly performs the covenants. And if before judgment in ejectment be pronounced the tenant tenders the rent and costs, the proceedings are to cease. The statute further enacts, that chief leases may be renewed without surrendering all the under-leases. *Renewals.*

By the stat. 11 *Geo.* 2. *c.* 19. §. 18. it is declared, that in case any tenant shall give notice of his intention to quit, and shall not accordingly deliver up possession of the premises at the time in such notice mentioned, that then such tenant or tenants, his executors or administrators, shall from thenceforward pay to the landlord *double the rent* which he should otherwise have paid.

This statute also empowers landlords to follow goods fraudulently and clandestinely removed for 30 days, and to seize stock or cattle on the premises, and to cut all sorts of corn grass hops or other product for arrears of rent. It also regulates the law upon distresses and replevins, and enacts penalties on tenants secreting ejectments served on them. It further provides for cases where tenants desert the premises leaving the possession vacant. See also the 57 *Geo.* 3. *c.* 93. for regulating the costs of distresses for small rents, and the late act, 1 *Geo.* 4. *c.* 87. for facilitating the remedy by ejectment, *infra.*

Stat. of Foreclosures, 7 *Geo.* 2. *c.* 20., *A. D.* 1734.—By this act it is provided, that after payment or tender by the mortgagor of principal, interest, and costs, the mortgagee shall maintain no action of ejectment or foreclosure, but may be compelled to re-assign his securities, and to deliver all the *Foreclosures.*

mortgage deeds and writings to the mortgagor. For an exposition of this stat. see 1 *Pow. Mortg.* 168 a. 2 *Ib.* 992. 998.

Charitable Uses. Stat. of Charitable Uses, 9 *Geo.* 2. *c.* 36., *A. D.* 1736.—This is an enabling statute rather than a disabling one. It enacts, that no hereditaments, nor any sum to be laid out in hereditaments, shall be in anyways conveyed or settled to any person or body corporate *in trust, or for the benefit of any charitable uses whatsoever,* unless such gift, conveyance, or settlement, be made by deed indented, sealed and delivered in the presence of two or more credible witnesses, twelve calendar months at least before the death of the donor or grantor (including the days of the execution and death), and be inrolled in his Majesty's High Court of Chancery within six calendar months next after the execution thereof; sect. 1. By sect. 2, it is declared, that nothing thereinbefore mentioned relating to the sealing and delivering of any deed *twelve calendar months before the death of the grantor* shall extend to any purchase for a full and valuable consideration actually paid before the making such conveyance without fraud or collusion. Sect. 3. declares, that all other gifts to charitable uses shall be void.

By the 52 *Geo.* 3. *c.* 102. (9th July, 1812), a memorial of all charities is required to be registered with the clerk of the peace in each county, within six calendar months after the passing of the act; and it is declared, that all charitable donations thereafter to be made shall be registered in like manner with the clerk of the peace within twelve months after the making the same.

By 1 & 2 *Geo.* 4., 1821, trustees of charities are enabled to exchange lands.

Recoveries. Pigott's Act. Pigott's Act, 11 *Geo.* 2. *c.* 20., *A. D.* 1741.—This stat. provides, 1st. That the deeds making the tenant to the *præcipe* may be executed at any time during the term in which the

recovery is suffered. 2d. That it is not necessary for freehold leases for lives at reserved rents to be surrendered, nor for the lessees to join in making a tenant to the writ of entry. 3. That a purchaser, after twenty years may produce the recovery deed in evidence of the recovery having been suffered, although no entry of it appears on record. 4th. That all common recoveries not disputed within twenty years, shall be deemed valid, notwithstanding the deed for making the tenant to the *præcipe* be lost or shall not appear. And, 5th, that estates *pur auter vie*, in case there be no special occupant thereof, of which no devise shall have been made according to the Statute of Frauds, or so much thereof as shall not have been so devised, shall go, be applied, and distributed in the same manner as the personal estate of the testator or intestate. *Occupancy*

By stat. 21 *Hen.* 8. *c.* 15. lessees for years are secured from the operation of recoveries suffered by their landlords. And by 14 *Eliz.* *c.* 8. lessees for lives are empowered to join in recoveries without incurring a forfeiture of their estates, *ante* p. 351.

Wills, 25 *Geo.* 2. *c.* 6., *A. D.* 1752.—By this statute it is enacted, that if any beneficial devise or legacy be given to a person attesting the will devising or bequeathing such benefit (except the same be for payment of a debt due to such person), such devise or bequest shall, so far only as concerns the person so attesting, be utterly void; and such person shall be admitted as a witness to such execution, within the intent of 29 *C.* 2. *c.* 3. *s.* 5. *Wills.—Attestation.*

By sects. 3. & 6. it is declared, that a devisee or legatee who has been paid, or accepted, or released, or has refused his devise or legacy, shall be admitted as a competent witness. By sect. 4. it is declared, that after a legatee has renounced his legacy, he shall never after be entitled to it; and if he has accepted his legacy, he shall not afterwards be permitted to return it, although the will be rendered void for want of his competency as a witness. It is further

declared, that a legatee attesting a will and dying in the lifetime of the testator, or before he has received or refused his legacy, shall be admitted as a legal witness [by proof of his hand-writing]. The credit of a witness is to be determined by the Court.

By a late case it has been decided, that an executor is a competent witness to the testator's sanity, although he takes a beneficial interest under his will. *Doe* d. *Wood* v. *Teage*, 5 *Barn. & Cress.* 335.

Renewal of Leases.

Renewal of Leases by incapacitated Persons 29 *Geo.* 2. *c.* 31., *A. D.* 1756.—By this statute it is declared, that where any person under the age of twenty-one, or any lunatic, or feme covert, is interested in or entitled to, any lease for lives or years, either absolute or determinable upon death, or otherwise, such person under age, or his guardian, or committee, or other person on his behalf and such feme covert or any person on her behalf, may apply to the High Court of Chancery or to the Courts of equity of *Chester*, *Lancaster*, and *Durham*, or the Courts of Great Sessions of *Wales*, by petition or motion in a summary way; and by the order of such Courts made upon hearing all parties, such person so under age, and such lunatic or person appointed by such Courts, and such feme covert, by deed only, without levying any fine, shall be enabled to surrender such lease, and accept in the name and for the benefit of such person under age, lunatic, or feme covert, new leases of the premises surrendered for such lives, or term determinable upon lives, or term absolute, as was mentioned in such lease so surrendered, at the making thereof or otherwise as such Courts shall direct. Expenses attending renewals, to be charged on the estates as the Courts shall direct. The leases so renewed are declared to be to the same uses, and liable to the same trusts, charges, incumbrances, dispositions, devises, and conditions, as the surrendered leases were subject and liable to.

By a subsequent stat. 11 *Geo.* 3. *c.* 20. it is enacted, that lunatics by their guardians, or committees, may accept of

surrenders and make new leases under the direction of the Lord Chancellor. The money arising from the renewals to be taken by the guardians of such lunatics, and to be considered as real estate unless such lunatics shall be tenants for life only, and then the same shall be considered as personal estate.

Nullum Tempus.

Nullum Tempus Act, 9 *Geo.* 3. *c.* 16., *A. D.* 1769.—By this statute the Crown is disabled from suing for the recovery of any lands, tenements or hereditaments, where its right hath not accrued within a period of sixty years next before, *et vide* 11 *East* 488. for a case on its construction.

Papists.

Roman Catholics, 18 *Geo.* 3. *c.* 60., *A. D.* 1778.—By this act Roman Catholics taking the oaths of allegiance to his Majesty, abjuration of the Pretender, renunciation of the Pope's civil power, and abhorrence of the doctrine of destroying heretics, and deposing princes excommunicated, are enabled to take and hold lands, *et vide* 31 *Geo.* 3. *c.* 32.

Money-land.

Money-land, Lord Eldon's Act, 39 & 40 *Geo.* 3. *c.* 56., *A. D.* 1800.—Where money is directed to be laid out in land, to be settled in such manner that it would be competent in case such money had been invested for the person who would be tenant of the first estate in tail, by deed, fine, common recovery, or other lawful act, to bar the first estate tail, and the rights and interests of all in remainder, such money need not be actually invested in order to bar such estates tail and remainders over; but the Court of Chancery may, in a summary manner, upon the petition of the person who would be the first tenant in tail, and of the person who would be the owner of the antecedent particular estate, if any, in the lands, in case the same were purchased (such petitioners being adults, and if *femes covert*, they being first separately examined in Court, or on a commission, and consenting), order the *monies* subjected to such trusts to be paid to the petitioners, or to be paid and applied as such petitioners shall

appoint and the Court approve. On the construction of this stat. see 5 *Madd.* 407. 5 *Ves.* 12. 6 *Ib.* 576. 8 *Ib.* 609. 9 *Ib.* 462., 56. The Irish Act for a similar purpose is 58 *Geo.* 3. *c.* 46., *A. D.* 1818.

Crown Lands. Crown lands, 39 & 40 *Geo.* 3. *c.* 88. See *infra*, 1 *Geo.* 4. *c.* 1.

The lands which in this act are recited to devolve on the crown for want of heirs, are only such as are held immediately of the crown, as is apparent from the construction given to the two prior acts respecting escheats, (8 *Hen.* 6. *c.* 16. 18 *Hen.* 6. *c.* 6.) in the late case of *Doe* v. *Redfern*, 12 *East* 96. 102. *et vide supra*, Stat. *Quia Emptores*, and 54 *Geo.* 3. *c.* 145. as to corruption of blood, *infra*.

Accumulative Trusts. Thellusson's Act, 39 & 40 *Geo.* 3. *c.* 98., *A. D.* 1800.—This statute has been already noticed and commented on, *ante* p. 179.

Inclosure Act. Inclosure Act, 41 *Geo.* 3. *c.* 109., *A. D.* 1801.—This is an act for consolidating the provisions usually inserted in local inclosure acts, and for facilitating the mode of proving the several facts usually required on the passing such acts. The provisions are too numerous for insertion here. It was amended by 1 & 2 *Geo.* 4. *c.* 23. which gave landlords a power of distress before the execution of the award, and enabled incumbents to grant leases in certain cases.

Land Tax. Land Tax Consolidation Act, 42 *Geo.* 3. *c.* 116., *A. D.* 1802. —By sect. 52., tenants in tail are enabled to convey such parts of their estates as shall be deemed eligible and necessary to be sold for the redemption of the land tax charged thereon, by deed indented and enrolled, or registered in the manner prescribed by this act; and it is declared, that every such deed shall be as effectual as if the tenant in tail had levied a fine or suffered a recovery thereof. The late acts on this subject are 1 & 2 *Geo.* 4. *c.* 123. 3 *Geo.* 4. *c.* 14. 4 *Geo.* 4. *c.* 68.

Lunatics. Stat. concerning Lunatics, 43 *Geo.* 3. *c.* 75., *A. D.* 1803.—



By this act it is declared, amongst numerous other clauses, that the Lord Chancellor being entrusted with the persons and estates of lunatics may order the freehold and leasehold estates of such persons to be sold or charged by mortgage, for raising money for the payments of debts, &c. and where lunatics are seised of freehold or copyhold estates in fee or in tail, and an absolute interest in leasehold estates, the Lord Chancellor may* direct the committee of the estate to make leases thereof. In *Birch*, *exp*. 3 *Swan*. 98., the Lord Chancellor said, the power of sale in this act was confined in terms to freehold and leasehold estates. That observation, it is presumed, was the occasion of the 59 *Geo*. 3. *c*. 80., whereby copyhold estates and lands held in ancient demesne are expressly made subject to the powers and provisions of this statute. *Lunatics.*

Property Tax Consolidation Act, 46 *Geo*. 3. *c*. 65., *A. D.* 1806., expired 1816.—The following is a list of the acts on this subject, which are now no farther serviceable than as shewing the allowances to be made in old accounts. 38 *Geo*. 3. *c*. 16.—10 *per cent*. on incomes above 200*l*. a-year, 1798. 39 *Geo*. 3. *c*. 13. 39 *Geo*. 3. *c*. 22. 39 *Geo*. 3. *c*. 42. 39 *Geo*. 3. *c*. 72. 39 & 40 *Geo*. 3. *c*. 96. 43 *Geo*. 3. *c*. 122. —reduced to 5 *per cent*. 45 *Geo*. 3. *c*. 110.—raised to 6½ *per cent*. 46 *Geo*. 3. *c*. 65.—raised to 10 *per cent*. 1816, 56 *Geo*. 3. *c*. 65.—continuing former acts till arrears paid. On the motion of Mr. Brougham in 1816, all the official accounts and returns and every paper connected with this tax were ordered by the House of Commons to be burnt, which was accordingly done. *Property Tax.*

Annuity Act, 53 *Geo*. 3. *c*. 141., *A. D.* July, 1813,—amended 3 *Geo*. 4. *c*. 92.—By these acts every grant of annuity is required to be enrolled in Chancery, within thirty days after its execution, otherwise it is declared null and void. See 1 *Byth. Prec*. 330. for an exposition of these statutes, and the late cases of *Cupit* v. *Jackson*, 1 *M'Lel. & Yo*. 495. *Calion* v. *Porter*, 2 *Bing*. 370. *Fairfield* v. *Annuity Act.*

Weston, 2 *Sim. & Stu.* 95. *Hicks* v. *Keats*, 4 *Barn. & Cress.* 69. *Storton* v. *Tomlins*, 2 *Bing.* 475.

Corruption of blood.

Corruption of Blood, 54 *Geo.* 3. *c.* 145., 1814.—By this statute corruption of blood is taken away for attainder of felony, except in cases of treason, petit treason, and murder. The statute enacts that no attainder of felony, except in the lastly mentioned cases, shall extend to the disinheriting of any heir, nor to the prejudice of the right or title of any person or persons, other than the right or title of the offender or offenders, during his, her, or their natural lives only.

Between *forfeiture* and *escheat* there is this difference. Forfeiture is a punishment for a malignant offence. Escheat arises from an obstruction in the course of descent. The former is personal to the offender; the latter respects his successor. Forfeiture affects the rents and profits only; escheat operates on the inheritance. Thus in the case of forfeiture for felony, if the felon be seised of an estate in fee-simple, the lands will stand forfeited to the king for a year, day, and waste, and afterwards to the lord of the manor for the residue of the felon's life, provided the lord, as is usually the case, can shew a prescriptive right to or a grant from the crown of felons' goods. If the lord cannot prove his right to the goods and chattels of the felon, then the rents and profits of the felon's estates will belong to the crown for the residue of the felon's life. 1 *Inst.* 39 b. 36 b. 40 a. On the felon's death, if there has been no attainder, that is, if sentence of *death* hath not been passed upon him, his lands will descend to his heir without prejudice however to the king's year, day, and waste; but if in addition to the conviction of felony, judgment of death has passed upon the felon, his blood has become corrupted, and he can have no heir; in which case, the lands will on his death escheat to the lord of the fee, or to the king if the tenure be immediately of him. See 3 *Pres. Abs.* 391. The above statute takes away the effect of attainder, and therefore escheats are now confined to natural death without heirs, except in cases of treason and

murder. If the owner of fee-simple lands be convicted of forgery, and sentence of death passes upon him, which is commuted to transportation for life, the king takes his year, day, and waste, the lord of the manor enjoys the rents and profits as *bona felonum* for the life of the felon, and on his death his heir at law succeeds to the estate by descent in the usual way. The legal estate it is conceived is in the felon during his life, which he may alien so as to disappoint his heir but not the lord; the purchase money, however, if any, would belong to the lord as part of the goods and chattels of his felon, who being degraded below the ancient villein is also himself part of the lord's property. *Escheat.*

A notion prevails (sanctioned no doubt by the recital in the stat. 39 & 40 *Geo. 3. c.* 88. *infra* crown lands), that if a fee-simple tenant dies without heirs his lands revert to the king, which is only true in cases where the lands are holden immediately of the king, (as in ancient demesne), or where all badges of tenure having been neglected, it is no longer known of whom the lands are mediately holden. Escheats it is conceived belong to the lord in right of his seignory. They are a fruit of tenure, and were not abolished by the statute of Charles. Military tenures only were abolished by that statute, the rents and services were reserved, and fealty is a service which is still due from the fee-simple tenant to the lord of the manor. The boundaries of manors are scrupulously preserved by the perambulation of the court-leet homage every third year; and when a tenant within that boundary dies without an heir (as a bastard for instance), the lands naturally revert back to the lord of the manor, from whom they were originally derived. See *Booth*, 135. *May* v. *Street*, *Cro. Eliz.* 120. 3 *Cru. Dig.* 496. *Doe* v. *Redfern*, 12 *East*, 96. 1 *Rosc.* 34. 4 *Haw. P. C.* 478, *7th ed.* 2 *Watk. Cop.* 366., and particularly 2 *Black. Comm.* 244. *infra*, c. 1. *Geo.* 4. as to the crown lands and titles by escheat, *et ante*, p. 366.

Copyright, 54 *Geo.* 3. c. 156., *A. D.* 1814.—This act extends to authors and their assigns, the sole right of printing *Copyright.*

Copyright. original compositions for the period of twenty-eight years, and for the further period of the life of the author if he shall be living at the end of that time. On the construction of this stat. see the case of *Brooke* v. *Clarke*, 1 *Barn. & Ald.* 396. respecting *Mr. Hargrave's* edition of *Co. Litt.* who survived the first impression of his notes upwards of fifty years.

Attestations. Stat. of Attestation, 54 *Geo.* 3. *c.* 168., *July*, 1814.—By this statute it is enacted, that every deed or other instrument *already made* with the intention to exercise any power, authority, or trust, shall be of the same validity and effect as if a memorandum of attestation of signature had been subscribed by the witness or witnesses thereto, and that the attestation of the witness or witnesses thereto, expressing the fact of sealing, or of sealing and delivery without expressing the fact of signing, or any other form of attestation, shall not exclude the proof or the presumption of signature. This act was occasioned by the decisions in *Wright* v. *Wakeford*, 4 *Taunt.* 213. and *Doe* v. *Peach*, 2 *M. & S.* 576. It relates to the past not to the future, being in that respect the very reverse of the act respecting copyhold surrenders to will, *infra*.

Stamps. Stamp Duty Consolidation Act, 55 *Geo.* 3. c. 184., *A. D.* 1815. 1 & 2 *Geo.* 4. c. 55. 3 *Geo.* 4. c. 117. Transfers of Mortgage. 6 *Geo.* 4. *c.* 45. 46. 5 *Geo.* 4. *c.* 41: repeal of duties on law proceedings. Irish Stamp Act, 1 & 2 *Geo.* 4. 112.

Copyholds. Copyhold surrenders to Will, 55 *Geo.* 3. *c.* 192., *July*, 1815.—All *future* devises of copyhold lands are by this act declared valid although there shall not have been a surrender to the use of the will in the same manner to all intents as if such surrender had been made. But it is declared that the act shall not render valid any devise which would have been invalid if a surrender had been made, and the like stamp duties and fees are made payable on admission of the devisee

as if a surrender to will had been actually made. For an exposition of this stat., see 1 *Watk. Cop.* 202. *4th ed.*

Alien Act, 56 *Geo.* 3. *c.* 86., *A. D.* 1816., continued and amended by 58 *Geo.* 3. *c.* 96., and 5 *Geo.* 4. *c.* 37.—By the common law aliens, that is, persons born out of the dominions of the Crown of England, (except the children and grandchildren of natural born subjects,) are incapable of holding freehold estates for their own benefit, unless they are naturalized by Act of Parliament, or made denizens by the King's letters patent, 1 *Inst.* 2 b. The reason given why an alien cannot purchase lands is because the kingdom might be thereby impoverished by transporting its revenues into a foreign country, and putting a part of it under the subjection of a foreign prince. *Sty.* 21. If the purchase be made with the *King's licence* it seems that an alien may hold. See 14 *H. 4th. c.* 20. He cannot protect himself by taking a conveyance in the name of a trustee, for the mischief is the same as though he had purchased the lands himself. *Rex* v. *Holland*, *All.* 15. 1 *Ro'l. Abr.* 194. *Com. Dig. Alien c.* 3. *Harg.* n. 2. *Co. Lit.* 2, *ib.* Aliens therefore generally purchase in the names of their wives or children (being natural born subjects) by way of advancement; and they are empowered by stat. 13 *G.* 3. *c.* 14. to lend money on mortgage of West India estates. The stat. 32 *Hen.* 8. *c.* 16. *s.* 13. makes void all leases of houses or shops granted to an alien artificer or handicraftsman. It seems however, if an alien artificer occupies a dwelling-house or shop under an agreement which does not amount to a *lease*, as if he be tenant from year to year, or for one year or a shorter time, an action for *use and occupation* will lie against him. *Pilkington* v. *Peach*, 2 *Show.* 135. By the statute 11 & 12 *Will.* 3. *c.* 6. it is enacted that all persons, being natural-born subjects, may inherit and make their title by descent from any of their ancestors, lineal or collateral, although their father or mother, or other ancestor through whom they derive their pedigree, were born out of the King's allegiance.

Aliens.

Aliens.

But see the subsequent statute, 2 *Geo.* 3. *c.* 39. The statutes at the head of this paragraph interpose restrictions to naturalization, and they are continued for two years by the 5 *Geo.* 4. This subject is treated of more fully in 1 *Tho. Co. Litt.* 91—94. As to American aliens, see the late case of *Doe* dem. *Thomas* v. *Acklam*, 2 *Barn. & Cress.* 779.

Land Revenues.

Crown Lands and Hereditary Revenues of the King, 1 *Geo.* 4. *cap.* 1., 1820.—The greatest part of the land revenues of the Crown have been from time to time granted away by successive kings to lords of manors and others, who now for the most part hold the prerogative rights of estrays, waifs, felons' goods, deodands, &c. as their own absolute property. These grants having greatly impoverished the patrimony of the Crown, an act was passed in the reign of Queen Anne, whereby it was declared that all future grants or leases by the Crown for any longer term than thirty-one years or three lives should be void. 1 *Ann.* stat. 1. *c.* 7. amended and continued by the 34 *Geo.* 3. *c.* 75. At the commencement of the reign of *Geo.* 3. the hereditary revenues of the Crown arising from renewal fines, unclaimed estrays, escheats from manors held *in capite*, and such like, being very uncertain, with all other hereditary revenues were given up by his Majesty to the aggregate fund; and in lieu thereof his Majesty received 800,000*l.* a-year for the maintenance of his civil list. 1 *Geo.* 3. *c.* 1. By subsequent acts, 34 *Geo.* 3. *c.* 75. 52 *Geo.* 3. *c.* 161. 48 *Geo.* 3. *c.* 73. these hereditary revenues were put under the management of commissioners styled "Commissioners of His Majesty's woods, forests, and land revenues." This arrangement was confirmed on the accession of his present Majesty by stat 1 *Geo.* 4. *c.* 1.

The above mentioned statute of Anne having declared the King's grants void, there was no mode of regranting lands held immediately of the crown to the families of person dying without heirs but by act of Parliament. This being found inconvenient, the statute of 39 & 40 *Geo.* 3. *c.* 88.

Escheats to Crown.

was passed, which after reciting that divers lands, tenements, and hereditaments, as well freehold and copyhold, had escheated, and might escheat to his Majesty, his heirs and successors in right of his crown for want of heirs of the persons last seised, it is declared, that it shall be lawful for his Majesty, by warrant under his sign manual, to direct the trusts of any lands so escheated to be performed, and to make any grants of lands so escheated to any trustee for the execution of the trusts, and to make any grants of lands escheated not subject to trusts to any person or persons, either for the purpose of restoring the same to the family of the person whose estate the same had been, or of rewarding any person making discovery of any such escheat, as to his Majesty, his heirs or successors, should seem fit; *et vide ante* p. 366.

Escheats to Crown.

Stat. improving Remedy by Ejectment as between Landlord and Tenant, 1 *Geo.* 4. *c.* 87., *A. D.* 1820.—This statute enacts, that where the term or interest of any tenant, now or hereafter holding under a lease or agreement in writing any lands, tenements, or hereditaments, for any term or number of years certain, or from year to year, shall have expired or been determined, either by the landlord or tenant, by regular notice to quit, and such tenant, or any one holding or claiming by or under him, shall refuse to deliver up possession accordingly, after lawful demand in writing, made and signed by the landlord or his agent, and served personally upon, or left at the dwelling-house or usual place of abode of such tenant or person, and the landlord shall thereupon proceed by action of ejectment for recovery of possession; it shall be lawful for *him*, at the foot of the declaration, to address a note to such person or tenant, requiring him "to appear in the Court wherein the action is commenced on the first day of the *then next term*, there to be made defendant, and find bail pursuant to the act;" and upon the appearance or non-appearance of the tenant at the day prescribed, to move for a rule, why he should not undertake to give the plaintiff a

Ejectment—Landlord and Tenant.

Ejectment. judgment as of the term preceding, in case a verdict should go against him at the time of trial, and why he should not enter into a recognizance by himself, and two sureties in a reasonable sum, conditioned to pay the costs and damages of the action; and if the tenant shall not conform thereto, then that judgment shall be for the landlord to recover possession in such ejectment immediately.

It will be recollected, that *Hilary* and *Trinity* terms are the only two terms in which the judges go the circuits for the trial of causes wherein issues have been previously joined: hence these terms are called issuable terms, and ejectments can be tried only at these stated times. The above statute, by giving remedy in the next term, much facilitates the process of ejectment as between landlord and tenant. On the construction of this act it has lately been decided, that tenants from year to year are not within it. *Doe dem. Bradford* v. *Roe*, 5 *Barn. & Ald.* 770. See also *Doe dem. Phillips* v. *Roe*, 1 *Dow. & Ry.* 433. *Anon.* 1 *ib.* 435. *Doe dem. Anglesea* v. *Roe*, 2 *Dow. & Ry.* 565. The Irish acts of similar tendency are the 58 *Geo.* 3. *c.* 39., 1818. 1 *Geo.* 4. *c.* 41.

Lunatics. 1 & 2 *Geo.* 4. *c.* 15. 1 & 2 *Geo.* 4. *c.* 114., repealed by 6 *Geo.* 4. *c.* 75. *infra*, *et vide* 2 *Watk. Cop.* 84, 85. *4th ed.*

Insolvents. Insolvent Debtors' Act, 3 *Geo.* 4. *c.* 123., *A. D.* 1822, amended by 5 *Geo.* 4. *c.* 61.—By these statutes all the insolvent's real estates are vested in his assignee on his being discharged, but no mention is made as to the operation of his assignment on estates tail vested in him, or whether a fine or recovery is necessary to bar the entail and remainders. There cannot, however, be much doubt on the subject, and see *Nich. Insol. Act*, p. 25.

Bankrupts. Stat. of Bankruptcy, 6 *Geo.* 4. *c.* 16., *A. D.* 1825.—By this act the commissioners are empowered to convey all the bankrupt's real estates to his assignees, which convey-

ance, it is declared, shall have the effect of a fine and recovery to bar all estates tail and remainders in the bankrupt to the same extent as the bankrupt himself might have done. By sec. 77. it is provided, that the assignees may exercise all powers vested in the bankrupt. This act more completely divests all estates out of the debtor than the insolvent act, for if an equity of redemption remain after payment of all the debts, the bankrupt himself cannot redeem, but must use the names of his assigness; whereas an insolvent debtor may himself redeem such a surplus. 1 *Pow. Mortg.* 262. *Bankrupts.*

Stat. of Infant, Lunatic, and Absent Trustees, 6 *Geo.* 4. c. 74., 27 *June*, 1825. This statute repeals the 7 *Anne*, c. 19. 4 *Geo.* 3. c. 16. 4 *Geo.* 2. c. 10. 1 & 2 *Geo.* 4. c. 114. 36 *Geo.* 3. c. 90. 52 *Geo.* 3. c. 32. 52 *Geo.* 3. c. 158. 57 *Geo.* 3. c. 39. and the 1 & 2 *Geo.* 4. c. 15. It then provides, "that when any person seised or possessed of any lands, hereditaments, or other property, or any estate or interest therein, upon any trust, or by way of mortgage, shall be under the age of twenty-one years, it shall be lawful for such infant, by the direction of the Court of Chancery or Exchequer, to convey, release, surrender, assign, or otherwise assure such lands, hereditaments, property, estate, or interest, to such person, and in such manner as the said Courts respectively shall direct; and every such conveyance shall be as valid and effectual as if the said person, being an infant, were at the time of executing the same of the full age of twenty-one years;" sect. 2. *Incapacitated Trustees.* *Infant Trustees.*

By section 3. it is enacted, "that when any person seised or possessed of any lands, hereditaments, or other property, or any estate or interest therein, upon any trust, or by way of mortgage, shall be idiot, lunatic, or of unsound mind, it shall be lawful for the committee of such person, or any person to be appointed as after-mentioned, in the name of such idiot or lunatic, by the direction of the Lord Chancellor, to convey, release, surrender, assign, or otherwise assure such lands, hereditaments, property, estate, or interest, to such person *Idiot or Lunatic Trustees.*

and in such manner as the Lord Chancellor shall think proper and direct; and every such conveyance or assurance shall be as valid and effectual, as if the idiot or lunatic had been at the time of sane mind and had executed the same."

By sect. 4. it is provided, "that the Lord Chancellor, before inquisition found, may appoint a person to convey the estates of an idiot or lunatic trustee or mortgagee."

Absent Trustees.

Sect. 5. enacts, "that when any person seised or possessed of any lands, hereditaments, or other property, or any estate or interest therein, upon any trust, or by way of mortgage, shall be out of the jurisdiction of or not amenable to the process of the Court of Chancery or Exchequer, or it shall be unknown or uncertain whether he, she, or they be living or dead, or such person or persons shall refuse to convey, or otherwise assure such lands, hereditaments, property, estate, or interest, to the person entitled thereto, or to a *new trustee* or trustees duly appointed by virtue of some power, or by the Court of Chancery or Exchequer, it shall be lawful for the Court of Chancery or Exchequer, to appoint such person as to such Court shall seem meet, on behalf and in the name of the person seised or possessed as aforesaid, to convey, surrender, release, assign, or otherwise assure the said lands, hereditaments, property, estate, or interest, to such person and in such manner as the said Court shall think proper and direct; and every such conveyance shall be as valid and effectual as if the absent or unknown person had by himself executed the same."

Trustee having duty to perform.

And by sect. 10. it is enacted, "that the several provisions thereinbefore contained, shall extend to cases in which a trustee [*not* "or mortgagee"] may have some beneficial estate or interest in the lands, hereditaments, property, stocks, funds, or securities vested in him, and also to cases in which the trustee may have some duty to perform so as to enable conveyances and transfers to be made, in order to vest any lands, hereditaments, property, stocks, funds, or securities, in a new trustee appointed in his place, by virtue of some power, or by the Court of Chancery or Exchequer, either alone or

jointly, with any continuing trustee or trustees, as the case may require.

For an exposition of this statute, see 2 *Pow. Mortg.* 207.

Currency, 6 *Geo.* 4. *c.* 79., to commence *July*, 1826.— This act regulates the law of tender, on which subject see 2 *Pow. Mortg.* 937. *Currency.*

Pardons, 6 *Geo.* 4. *c.* 25. By this statute a pardon for any felony granted on condition of transportation, imprisonment, or other punishment, is declared to have the same effect as a pardon under the Great Seal. Hence felons whose punishments are thus commuted are rendered capable of holding lands in future: but the lands and goods which they possess at the time of conviction remain subject to forfeiture as before. 4 *Hawk. P. C.* 356. *7th ed.* *Pardons.*

PRINCIPLES

OF

CONVEYANCING, &c.

BOOK III.

OF CONVEYANCES, WITH RESPECT TO PARTIES.

CHAPTER I.

OF AN INFANT.

AN infant may *take by purchase*, as he may do any thing which is manifestly for his advantage; and, if a feoffment be made, livery may be given to him in person, or even to another whom he shall appoint as his attorney; though the appointment of an attorney by an infant is not valid in itself at law.(*a*)

Co. Litt. 2 b.

1 *Roll. Abr.* 730. *Enfant.* (D.) *pl.* 6. See 3 *Burr.* 1794, &c.

(*a*) The acts of infants are distinguished into those which are absolutely void, and those which are voidable merely. This dis-

Co. Litt. 2 b. But he may wave snch conveyance when he comes of age; or, if he do not then actually agree to it, his heirs may wave it after him.(a)

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tinction is very important, 1st, because a *voidable* contract may be afterwards established by a confirmation, either express or implied, but a *void* contract cannot (*ante*, Ch. Confirmation); and 2dly, because where the contract is *actually void* neither party is bound by it; but where it is only *voidable*, the power of rescinding the contract is vested in the infant alone,—the other party being absolutely bound, if the infant when of full age chooses to hold him to his agreement. *Clayton* v. *Ashdown*, 9 *Vin. Abr.* 393. *Holt* v. *Ward*, *Clarencieux*, *Str.* 937. The precise criterion however of this distinction is not clearly settled. On the one hand it is said to depend entirely on the circumstance, whether the act is for the *advantage* or *disadvantage* of the infant; and that if it is an act which cannot be to the advantage of the infant it is actually void, but if it may be for his benefit it is only voidable. *Zouch* v. *Parsons*, 3 *Burr.* 1794. *Holt* v. *Ward*, *Clarencieux*, *Str.* 937. On the other hand the distinction has been made to depend solely on the *mode* in which the transaction takes place; it being said that all such gifts, grants, or deeds of an infant, as do not take effect *by the delivery of his hand* are void, but that those which do so take effect are only voidable. *Perk. s.* 12. The case referred to in the text, in 1 *Roll. Abr.* 730, was decided on the former of these grounds; the words being, "If a man makes a feoffment to an infant, and the infant makes a letter of attorney to another to receive livery for him, it is good, *because it is for his benefit.*" The latter of these grounds was adopted by the Court in the case of *Zouch* v. *Parsons*, 3 *Burr.* 1794.

(*a*) It is not necessary that the infant should *expressly* agree to the bargain to be bound by it: an *implied* agreement

All conveyances, however, *by* an infant, are voidable by him or his heirs, except a fine or recovery, which are only voidable during his minority.(*a*) All these conveyances are, never-

Touchst. 232. *Ibid.* 7. *Cru. Fines,* 110. *Cru. Recov.* 144. 3 *Burr.* 1794. *Zouch* v. *Parsons.*

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is in all cases sufficient; and an agreement may be implied from any act amounting to an assent to the transaction. Thus the continuance in possession after he comes of age of lands demised to him during infancy is an acceptance of the lease. 1 *Roll. Abr.* 731. K. So the receipt of rent after he attains twenty-one, in respect of lands demised by him during infancy, amounts to a confirmation of the grant. *Cecil* v. *Salisbury,* 2 *Vern.* 224. *Smith* v. *Lowe,* 1 *Atk.* 489.

(*a*) The distinction is between matters *in pais,* as deeds, and matters of *record,* as recognizances, fines, recoveries. Matters *in pais* he may avoid either within age or when he is of full age, but matters of record can only be avoided during minority. If, however, his age be tried during his minority by the inspection of the judges, and it be recorded that he is within age, in that case even a matter of *record* may be avoided after the infant attains twenty-one. *Co. Litt.* 380 b. But though a recovery suffered by an infant *in person* can be avoided only during his minority, yet if he suffer a recovery by *an attorney,* it may be avoided at any time. *Stokes* v. *Oliver,* 5 *Mod.* 209. *Zouch* v. *Michil, Godb.* 161. This difference arises from the distinction already noticed between matters *in pais* and matters of *record.* Where the recovery is suffered by the infant in person, it is wholly a matter of record, and therefore avoidable only during minority; but where it is suffered by attorney, the appointment of the attorney, being a matter *in pais,* may be avoided at any time; and that being avoided, the recovery founded upon it must necessarily fall to the ground with it. But on the other hand, where the matter of record is itself the basis

theless, if they tend to his benefit, good till actually avoided; but as to fines, the affidavit of acknowledgment by *dedimus potestatem* runs now, by rule of Court, that "the parties were of full age;" and, before that rule was ordained, the commissioners were subject to an attachment if they took the acknowledgment of an infant. An act of an infant, which *cannot* be to his advantage, is void *ipso facto*.

Zouch v. Parsons, *ubi sup.*

Cru. Recov. 148.

It was formerly the practice to petition the King for a privy-seal to enable an infant to suffer a recovery; but this is now disused, and recourse is had at this day to an act of parliament.(*a*)

of the transaction, or the principal, and the matter *in pais* is the accessory, that is, founded upon the matter of record, *there* the matter *in pais* cannot be avoided, without first avoiding the matter of record. Thus, if an infant suffer a recovery or levy a fine, and limit the uses thereupon, he cannot avoid the deed declaring the use, without avoiding the fine or recovery also. 2 *Rep.* 58. 10 *Rep.* 42. Lastly, it may be remarked, that a bargain and sale, though enrolled in a Court of record, is not such a matter of record as can be avoided only during minority, but the party may avoid it when he will. 2 *Inst.* 673.

(*a*) The course of proceeding under a privy-seal, was for the crown, upon petition of the infant or his guardian, to grant letters under the privy-seal to the judges of the Court of Common Pleas, directing them to permit the infant to levy a fine or suffer a recovery, and it was then in the discretion

An infant trustee or mortgagee may be ordered to convey even by fine, if not by recovery (see *3 Atk.* 164.), by a Court of equity, under the statute of the 7th *Ann. cap.* 19., and that act extends to the conveyance of copyholds.(*a*) 1 *Watk. Copyh.* 63.

So an infant may, in some cases, exercise a power; as where he is *a mere instrument*;(*b*) but it should seem not otherwise. *Powell on Powers*, 43—54. & 1 *Ves.* 301.

of the Court to permit the thing to be done or not, according to the circumstances. Sir T. Plumer, however, thought it a singular mode of application to the King for a recommendation to the judges to permit the infant to suffer a recovery, when it was in the discretion of the judges to permit the recovery to be suffered or not as they thought proper; and he added, that it was questionable whether such a recovery was not reversible for error. 1 *Turn.* 175. But in *Doe* v. *Rawding*, Bayley, J., said that the modern practice of applying for an act of parliament did not supersede the mode of suffering a recovery or levying a fine by privy-seal, which was still part of the law of the land. 2 *Barn. & Ald.* 450.

(*a*) The stat. 7 *Ann.* c. 19. has been repealed, and similar provisions made by the consolidated act 6 *Geo.* 4. *c.* 74. *ante*, p. 375.

(*b*) As in the case of a simple power of attorney at *common law*, *Co. Litt.* 52 a., or of a *collateral* power over real estates under the stat. of uses. *Sugd. Pow.* 155. As to powers over real estates *not simply collateral*, if the express dispensation with the disability of infancy, be not an ingredient in the power, it is settled that an infant cannot

1 *Bro. C. C.* 152. Williams v. Williams, & 3 *Ves. Jun.* 545. Williams v. Chitty.

And an infant may be bound by a fair and reasonable marriage settlement.(*a*)

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exercise it; but if there be an express dispensation, then it seems doubtful (there being no decision on the subject) whether the infant can exercise such a power or not. *Et vide Sugd. Pow.* 155. *Prest. on Abst.* 1. 326. *Har. & Butl. Co. Litt.* 52 a. n. (2). 171 b. n. (5). 271 b. n. (1). VII. 2.

(*a*) A *male* infant cannot make a binding settlement of his real estate. This seems to have been always treated as a clear point. 4 *B. C. C.* 506. 510, 511. Whether a *female* infant can make a valid settlement of her *real* estate, was at one time very doubtful: but it seems now to be settled, that a female cannot be bound as to her real estate by any articles entered into during minority, but may refuse to be bound and abide by the interest which the law casts upon her when she comes of age or is discovert; and her heir at law, if she dies during coverture, is entitled to the same election. The only way to bind a wife to articles, made during minority, is to procure her concurrence in a fine or recovery after she shall have attained her age of majority; she cannot testify her election in any other way. If she dies without having joined her husband in a fine or recovery, a right of election will accrue to the wife's heir, who may either affirm or repudiate the articles at his pleasure. But if he affirm the articles, it is conceived, that such affirmation is not to be treated as a voluntary settlement on his part, so as to render the same voidable by his creditors. See on this subject the cases of *Clough* v. *Clough*, 5 *Ves.* 717. *Simpson* v. *Gutteridge*, 1 *Mad. Rep.* 613.

As to the *personal* estate of a female infant, it seems, that her interest in that species of property, may be bound by agreement on her marriage; for, as Lord Hardwicke observed, if a parent or guardian cannot contract for the infant

A guardian may make leases during the minority of his ward. 2 *Roll. Abr.* 41. *Garde.* (2.) *pl.* 4. *Bac. on Leases. B.* & *I.* (s. 9.) p. 138.

An infant may be seised to an use.(*a*) *Sand. Uses.* 87.

And an estate may be limited by *way of remainder,* or *of use,* or given *by devise,* to an infant *en ventre sa mere;* but an *immediate* grant to such infant would not be good, as it would be *in futuro.*(*b*) In the case of a devise, See of the stat. 10 & 11 *Willm.* III. N. (3.) to *Co. Litt.* 298 a. & *Watk. on Desc.* ch. 4.

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as to bind her personal property, the husband, as it is a personal thing, would be entitled to it absolutely immediately on the marriage. *Harvey* v. *Ashley,* 3 *Atk.* 613.

(*a*) By the custom of particular places, as of Gavelkind in *Kent,* an infant may *sell* his lands by feoffment at the age of fifteen. *Rob. Gavel.* 193. 2 *Black. Com.* 84. But such custom being construed strictly, it is apprehended he cannot *mortgage* them. It is also observable that an infant of any age may present to a church, *Arthington* v. *Coverley,* 2 *Eq. Ca. Abr.* 518. *Hercle* v. *Greenbank,* 1 *Ves. S.* 304; and an infant may make a will of his personal estate; but there is a great difference of opinion about the *earliest* age at which such a will may be made. See *Harg. Co. Litt.* 89 b. n. (6). At the age of eighteen however, there seems to be not much doubt that a male infant may make a will of personal property. In 1 *Ves* 303. 3 *Atk.* 709. the Chancellor mentions seventeen, but speaks very ambiguously of a will being good if made at an earlier age.

(*b*) Posthumous children are now considered as actually born to all purposes, except in the case of a descent at common law; and in the case of a descent, the heir presumptive

the fee will descend to the testator's heirs at law till the child be born; in that of the remainder, the freehold is in the particular tenant; and the remainder vests in the child, though unborn, by the statute 10 & 11 *Wil.*
Ante 359. III. and in the case of the use, the legal estate is in the trustee.

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gives place to the real heir when born. See on this subject *Thelluson* v. *Woodford*, 4 *Ves.* 334, 335. *Doe* v. *Clark*, 2 *H. Black.* 399, *et ante* 359. An infant *in ventre sa mere* may be vouched in a recovery, may be an executor, may take by devise, or under a charge for portions, may have an injunction, and a guardian. 4 *Ves.* 322. It may be remarked, however, that where an infant is appointed executor, he cannot act as such till the age of twenty-one, till which time administration must be granted to another, 38 *Geo.* 3. *c.* 87.

CHAPTER II.

OF HUSBAND AND WIFE.

AS the husband and wife are but one person in law, if an estate be limited to them, they shall not take as joint-tenants (for a joint-tenancy necessarily implies a plurality of persons,) but the entirety is in each; and neither can alien without the other. (*a*) If it be limited to the husband and wife and another person, that other person shall take a moiety in joint-tenancy with the husband and wife; and the husband and wife shall have the other moiety

Litt. s 291. & *Co.* upon that sect. 5 *Durnf & East.* 652. Doe *v.* Parratt, 2 *Cru.* 213.

(*a*) Those words in a conveyance which would make other persons joint-tenants will when used in a limitation to a husband and wife make them tenants by entireties, so that neither can alone sever the jointure but the whole must accrue to the survivor. *Green* v. *King*, 2 *Bl. Rep.* 1211. An estate however, may be so *limited* as to make a man and his wife take in severalty if need be, and the husband and wife may together by fine or recovery dispose of an estate held by entireties during the coverture. *Co. Litt.* 187 b. 188 a. *et ante*, 156. where this peculiar tenancy is treated of more fully.

by entireties, as they are but one person in law. (*a*)

(*a*) Another important consequence of this unity of person is, that at common law a husband cannot make a grant to his wife. *Co. Litt.* 112 a. He may however grant to her, 1st, under the statute of uses by granting the estate to another person to her use, *Co. Litt.* 112 a.—2dly, by creating a trust in her favour, *S. C.*—3dly, Under the custom of particular places, as the custom of York. *Bro. Custom.* 56.—4thly, He may surrender copyholds to her use. 4 *Rep.* 29 b.—And, lastly, he may give an estate to her by his will. *Litt. s.* 168. *and comment.*

CHAPTER III.

OF A FEME COVERT.

A *FEME COVERT* may *accept* an estate; and it shall be good till avoidance. (*a*) But *her conveyance* is absolutely void, and not merely voidable, except it be by matter of record. She can only be bound by fine, recovery, or act of parliament. 2 *Bl. Comm.* 292. *Touchst* 232. *Ante* 326, 327.

She may be seised to an use. *Sand. Uses.* 88.

The husband and wife, however, may together make leases of the wife's lands for three lives or a certain number of years, by the statute 32 *Hen.* VIII. *c.* 28. (*b*) 2 *Bl. Com.* 318. *Bac. on Leases* (C.)

(*a*) Her husband however may disagree thereto, and divest the whole estate; but even if the husband agrees to the conveyance the wife may waive it after his death; and so may her heirs, if she dies during coverture, or even if she dies after her husband's decease, provided she has not when free from coverture done any act expressive of her assent thereto. Her consent during coverture is nugatory. *Co. Litt.* 3 a.

(*b*) If the requisites of that statute are not complied with,

Powell on Powers, 31. 42 Hargr. n (6.) to Co. Litt. 112 a.

A power may be given to a married woman: and if a power be given to a *feme sole*, which it is intended she should execute though she afterwards marry, it should be expressly said "whether sole or covert" (*a*)

So a married woman may be enabled to dispose of her property, by limiting such property to her *separate use*; in which case she shall be considered in equity as a *feme sole*. (*b*)

1 *Ves.* 303. 518. 3 *Bro. C. C.* 8. See also 1 *Bro. C. C.* 16. Hulme *v.* Tenant, 3 *Ibid.* 340. Pybus *v.* Smith, 3 *Ves. Jun.* 266. Burnaby *v.* Griffin. See too 5 *Ves. Jun.* 692. Mores *v.* Huish, which though determined by the same Chancellor as decided that of Burnaby *v.* Griffin, may not perhaps, be very easily reconciled with the latter case. *See the Introduction.*

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the lease is only voidable, not actually void; and if she receive rent after her husband's death, the lease will be thereby confirmed. *Doe* v. *Weller*, 7 *T. R.* 478.

(*a*) It is clearly settled, that a married woman may exercise a power simply collateral though no special words are used to dispense with the disability of coverture; and that if there be an express dispensation with the coverture, she may exercise powers coupled with an interest; but with regard to powers coupled with an interest where the coverture is not expressly dispensed with, there is no decision on the point; the prevailing opinion however is, that she can exercise such powers also, *et vide Sugd. Pow.* 150. 1 *Prest. Abstr.* 340. *Harg. Co. Litt.* 112 a. n. 6.

(*b*) The case of *Mores* v. *Huish*, cited by Mr. Watkins in the margin, if not expressly over-ruled, has been so repeatedly contradicted by subsequent cases, that it can no longer be quoted as an authority. It is now established beyond all doubt that a married woman is to be considered as

So the husband, on marriage, may give the wife power to make a will, and it shall be good. See 2 *Ves.* 612, &c.

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a feme sole as to property given to her *separate use* except in so far as her power over that property is restrained by the instrument creating the power. *Wagstaff* v. *Smith*, 9 *Ves.* 520. *Parkes* v. *White*, 11 *Ves.* 209. *Watts* v. *Dawkins*, 12 *Ves.* 501. *Essex* v. *Atkins*, 14 *Ves.* 542. *et vide, ante*, 326, 327.

CHAPTER VI.

CORPORATIONS

OF their capacity to take. See 1 *Bl. Comm.* Chap. 18. 478-9. (*a*)

Davys's Rep. 44 *b.* Grants by Corporations must be by deed under their common seal; and such deed, so sealed, is good without delivery.

1 *Salk.* 193. But they may bind themselves by a matter of record without their seal.

Coke's Read. on Fines, Read. 7 & 8. 1 *Cru.* 118. 178. Corporations *aggregate* cannot levy a *fine*, as they can only appear by attorney; and a fine must be levied in person. Though it is said that a corporation *sole* may be a cognizor, for he may appear personally: but corporations of either kind may be *cognizees.* (*b*)

(*a*) Corporations may hold freehold lands transmitted to them by descent or succession, but they cannot purchase lands without the king's licence, nor can they take by devise. See *ante* stat. Mortmain, p. 359.

(*b*) Corporations are either Aggregate or Sole, Lay or

But a corporation cannot be seised to an use; and, therefore, it cannot make a bargain and sale. See Sand. Uses, 446, & Ante b. 1. c. 20.

And, consequently, if a lease and release be made by a corporation, the instrument on which the release is to be grounded, must not have the words—"*bargain and sell,*" but those of "*grant and demise;*" as it must operate as a *lease*, strictly, and *not as a bargain and sale*; and on such lease *the lessee must actually enter into the lands*; for, before entry, he can have no possession on which the release can operate. (*a*)

Ecclesiastical. *Aggregate* corporations, in a conveyance to them by licence, take the fee without words of limitation, and although they cannot levy fines, yet may they be barred by the non-claim on a fine: they may also take a chattel in succession. A *sole* corporation cannot take the fee without the word "successors," and the inclination of opinion seems to be that a sole corporation may levy a fine, particularly a sole lay corporation, which may be bound by matter of record. A sole corporation cannot take a chattel or term in succession, except the King and the Chamberlain of the City of London. *Ecclesiastical* corporations cannot alien their lands, nor will the non-claim on a fine run against them. *Lay* corporations may both alien their lands, and bar or bind themselves by fine; consequently they will be bound by the non-claim on a fine. The subject of this note is more fully discussed in 3 *Cru. Dig.* 514. 4 *ib.* 14. 5 *ib.* 176, 233.

(*a*) An exchange by an aggregate corporation is usually perfected by feoffment; livery being made by attorney. It may be effected by a lease with actual entry and release; but

2 Bl. Comm. 320. 1 Bac. Leases, E. F. G. H.

Ecclesiastical corporations are restrained from aliening, except for certain terms, by statute (a)

without the entry the release would in all probability be held good as a grant, *that* being the only *instrument* that is necessary to effectuate an exchange, which is an assurance at common law. See *ante Ch. Exchage.*

(*a*) By late acts they are enabled to exchange their lands for others of greater value or more conveniently situated. 55 *Geo.* 3. *c.* 147. 56 *Geo.* 3. *c.* 52.

A

TABLE OF CASES

CITED IN BOTH PARTS.

C.

D

E.

A

TABLE OF THE STATUTES

CITED IN BOTH PARTS.

2 E 2

AN

INDEX

TO THE

PRINCIPAL MATTERS

Contained in both Parts.

A.

B.

C.

D.

E.

F.

G.

H

I

J

K.

L.

M

N

O.

P

Q

R.

S.

T.

U.

V.

W.

Y.

FINIS.

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